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In The
Supreme Court of the United States

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JOE JAMES, et al.,

Petitioners,

v.

MEOW MEDIA, INC., et al.,

Respondents.

◆

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

◆

PETITION FOR A WRIT OF CERTIORARI

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MICHAEL A. BREEN
Counsel of Record
KERRY S. MORGAN
1700 Destiny Lane
Bowling Green, KY 42104
270-782-3030

EUGENE GRESSMAN
UNIV. OF NORTH CAROLINA
SCHOOL OF LAW
Chapel Hill, NC 27599-3380
919-962-3688

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Counsel for Petitioners

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QUESTIONS PRESENTED

1. Whether the Free Speech Clause of the First Amendment confers an absolute right on producers and distributors of adult-rated gun shooting marksmanship games and movies (a) to market and sell their products to young and impressionable boys, and (b) to instruct or illustrate to young boys how guns can be used to kill school classmates and principals.

2. Whether this case should be remanded to the courts below to allow factual development of the important issues arising under the Free Speech Clause of the First Amendment.

PARTIES TO SIXTH CIRCUIT PROCEEDINGS

The following individuals were Plaintiffs in the District Court, Appellants in the Sixth Circuit, and are the Petitioners before this Court:

1. Joe James and Judy James, Co-Administrators of the Estate of Jessica James;
2. Thomas Wayne Steger and Sabrina Collins Steger, Co-Administrators of the Estate of Kayce Steger; and
3. Gwen Hadley, Administratrix of the Estate of Nicole Hadley.

The following corporations and businesses were Defendants in the District Court, Appellees in the Sixth Circuit, and are the Respondents before this Court:

1. Meow Media, Inc., doing business as www.persiankitty.com;
2. Network Authentication Systems, Inc., doing business as www.adultkey.com;
3. Midway Home Entertainment;
4. Apogee Software, Ltd.;
5. ID Software, Inc.;
6. Acclaim Entertainment, Inc.;
7. Infogrames, Inc. f/k/a GT Interactive Software Corp.;
8. Interplay Entertainment Corp.;
9. Nintendo of America, Inc.;
10. Sega of America, Inc.;

PARTIES TO SIXTH CIRCUIT PROCEEDINGS – Continued

11. Irvine Games, Inc. f/k/a Virgin Interactive Entertainment, Inc.;
12. Activision, Inc.;
13. Capcom Entertainment, Inc.;
14. Sony Computer Entertainment, doing business as Sony Interactive Studios America;
15. Lasersoft, Inc.;
16. Williams Entertainment, Inc.;
17. Time Warner, Inc.;
18. Polygram Film Entertainment Distribution, Inc.;
19. Island Pictures Corporation;
20. Palm Pictures, LLC; and
21. New Line Cinema Corporation.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioners respectfully request that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding. The opinion was filed on August 13, 2002.

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OPINIONS BELOW

The opinion and judgment of the Sixth Circuit, entered on August 13, 2002, are printed at 300 F.3d 684, and are reprinted in the Appendix hereto, App. 1, p. 1, *infra*.

The opinion of the United States District Court for the Western District of Kentucky, dated April 6, 2000, is printed at 90 F.Supp.2d 798, and is reprinted in the Appendix hereto, App. 2, p. 33, *infra*.

On June 16, 2000, the District Court entered an unpublished memorandum opinion, denying a rehearing petition and dismissing the case in its entirety. That opinion is reprinted in the Appendix hereto, App. 3, p. 78, *infra*.

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JURISDICTION

The opinion and judgment of the Sixth Circuit were filed on August 13, 2002. No petition for rehearing was filed. The 90-day period for filing this Petition for Certiorari expires on November 11, 2002. This Petition was in fact filed before that November 11 date.

The jurisdiction of this Court to review the judgment of the Sixth Circuit is invoked under 28 U.S.C. §1254(1).

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CONSTITUTIONAL AND FEDERAL RULE PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in pertinent part, that

> Congress shall make no law . . . abridging the freedom of speech, or of the press, . . .

Rule 12(b)(6) of the Federal Rules of Civil Procedure provides that a defendant may move to dismiss a claim for "failure to state a claim upon which relief can be granted . . . [but] where matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

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STATEMENT OF THE CASE

On April 12, 1999, Petitioners filed a complaint in the United States District Court for the Western District of Kentucky (Paducah Division) against various groups of Respondents. Jurisdiction was based on the diversity of citizenship of the parties (28 U.S.C. §1332), federal question jurisdiction (28 U.S.C. §1331), and amount in controversy.

The basic theory of the complaint was that the Respondents' actions (or lack thereof) in creating and circulating a movie, numerous video games, and various Internet materials caused the deaths of the Petitioners' three daughters and the subsequent loss of earning capacity. As surviving parents of the daughters, Petitioners sued as duly appointed representatives of the estates of the their deceased daughters.

A. The basic facts

The facts surrounding the three deaths are not in dispute. The story began on the morning of December 1, 1997. The Heath High School in McCracken County, Kentucky, had just opened. Preceding the start of the first classes of the day, many of the students attended a voluntary prayer service in the school lobby. Among the attendees at the service that morning were three young girls: Jessica James, Kayce Steger, and Nicole Hadley. They were the daughters of the Petitioners.

Another student, a freshman at Heath High School, was Michael Carneal, age 14. He arrived early at the school, armed with five shotguns, a .22 caliber pistol, and some 1100 rounds of ammunition. He politely waited for the prayer session to end. He thereupon calmly shot and killed Jessica, Kayce and Nicole, as well as wounding five other students, as they were leaving the prayer service.

In the aftermath of this massacre the police seized young Michael's home computer. They discovered that Michael was an avid computer user who had logged onto the Internet to consume adult-rated material that was obscene, obscene for minors, pornographic, and/or violent in content. The police also learned that Michael was a consumer of adult-rated violent computer and video games, and was a consumer of movies containing obscenity, obscenity for minors, pornography, sexual violence, and/or violence. Among the many interactive computer games that Michael regularly played were "Doom," "Quake," "Castle Wolfenstein," "Redneck Rampage," "Nightmare Creatures," "Mech Warrior," "Resident Evil," and "Final Fantasy," all of which involve the player shooting virtual opponents.

Michael also consumed a videotape containing the movie called **The Basketball Diaries**. In this movie a high school student, portrayed by the actor Leonardo DiCaprio, graphically dreams of massacring his teacher and several of his fellow classmates with a shotgun.[1]

Michael was arrested and charged with second-degree murder. His family hired as their criminal defense expert a Yale medical professor, Dr. Diana Schetky. She has a worldwide reputation as an adolescent psychiatrist. She evaluated Michael to determine whether he was mentally ill within the meaning of the criminal code. She concluded that Michael was "profoundly influenced" by his exposure to the above violent and/or pornographic games, movies and tapes and that "[t]he media's depiction of violence as a means of resolving conflict and a national culture which tends to glorify violence further condoned his thinking."

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[1] As alleged in paragraph 13 of Count I of the complaint, the book upon which **The Basketball Diaries** movie was based contained no such shooting carnage. The **Diaries** movie makers, named as Respondents, intended to make, market and distribute a movie in which they added a gratuitous and graphic murder spree allegedly "for the sole purpose of hyping the movie and increasing its appeal to young audiences."

Michael Carneal was convicted of second-degree murder of the three girls and sentenced to 25 years in prison without possibility of parole.

B. Federal District Court proceedings

The parents of the three dead girls are also their estate administrators. They filed this action in the United States District Court for the Western District of Kentucky. Named as defendants were the Respondent companies that produce and sell to children the aforementioned movie (**The Basketball Diaries**), video games and Internet sites. Petitioners asserted three causes of action against the Respondents:

> 1. Relying upon Kentucky tort law, Petitioners asserted that the Respondents had been negligent in that they produced and/or distributed to Michael and other young boys not only adult-rated "pornographic and obscene material" but also violent shooting games and the violent movie **The Basketball Diaries**. They thereby created an unreasonable risk of harm to others. It was also alleged that these games trained Michael how to point and shoot a gun in a fashion making him an extraordinarily effective and accurate killer without teaching him any of the constraints or responsibilities needed to inhibit such killing potential. Respondents either knew or should have known that exposure to such material would make violence "pleasurable and attractive" to young boys like Michael, and thus insensitive to gun killings and more likely to commit such violent acts at school. But for Michael's steady diet of Respondents' adult-rated material, including computer video games and **The Basketball Diaries** movie, he allegedly

would not have shot and killed the three girl classmates.

2. Petitioners also asserted that the video game cartridges, movie cassettes, and Internet transmissions that the Respondents produced and distributed were "products" for purposes of Kentucky product liability law and that the violent features thereof were product "defects," thus making the Respondents strictly liable under Kentucky law for damages caused by such defects.

3. Petitioners' third claim was that some of the Respondents' conduct had violated RICO, the Racketeer Influenced and Corrupt Organization Act (18 U.S.C. § 1961 *et seq*). **Note:** After this RICO claim was denied by the District Court, it was not pursued on appeal and the Sixth Circuit considered the claim waived. *See* App. 1, p. 6, *infra*. This claim is not pursued before this Court.

Petitioners' complaint alleged with particularity multiple elements of knowledge, constructive knowledge, foreseeability and causation on the part of the Respondents. Each Respondent was also alleged to have known or to have had constructive knowledge that "copycat" violence would be caused by their adult-rated products, particularly when they were targeted and distributed to young boys like Michael. The products were also alleged to be defective and unreasonably dangerous within the standards for strict liability for defective products. All these allegations were based upon the common tort law of Kentucky as well as on §§302A, 302B, 449, and 402A of the RESTATEMENT (SECOND) OF TORTS.

The various Respondents thereupon filed motions to dismiss, pursuant to Fed. Civil Rule 12(b)(6), for "failure to state a claim upon which relief can be granted." They asserted that the Petitioners had failed to state a claim either for strict liability or for negligence under Kentucky tort law, emphasizing that Respondents owed no duty to the three girls killed by Michael Carneal and that his crimes were a superceding cause of the Petitioners' injuries.

Most of the Respondents also added to their motions to dismiss claims grounded in the Free Speech Clause of the First Amendment. The motions of those Respondents who had produced or distributed the film **The Basketball Diaries**, for example, asserted that "The First Amendment bars imposition of tort liability on the **Diaries** defendants based on the expressive content of **The Basketball Diaries**."[2] They further asserted that the Petitioners had not alleged, "nor could they," that the **Diaries** contains speech unprotected by the First Amendment.[3]

At no time did the District Court permit the Petitioners to submit the **Diaries** film or any of the other role-playing fantasy video games, pornographic material, or gun marksmanship exercises that allegedly inspired and caused Michael Carneal to assassinate the three girls. All discovery was foreclosed, making it impossible to prove Petitioners' claim that these products were intentionally targeted to young and immature children (thus establishing a foreseeable environment of use). Such evidence would have been relevant in establishing Petitioners' tort claims and the Respondents' First Amendment defenses.

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[2] From the Memorandum in Support of the Motion to Dismiss the Complaint filed by the Respondents Time Warner and New Line Cinema, the producers of the **Diaries** film.

[3] *Ibid.*

Without further ado, the District Court granted the Respondents' Rule 12(b)(6) motions to dismiss the complaint for failure to state any claim under Kentucky state tort law upon which relief could be granted. The court specifically held App. 2, pp. 76-77, *infra*:

1. The negligence claims must be dismissed because the Respondents owed no legal duty of care since Michael Carneal's actions were unforeseeable.
2. Alternatively, Michael's intervening acts constituted a superseding cause, thus absolving Respondents of liability.
3. The strict products liability claim must be dismissed because the thoughts, ideas and expressions contained within Respondents' movie, games, and website materials do not constitute "products" within the realm of the strict liability doctrine.
4. The RICO counts were also dismissed, though they are no longer in issue.

On the traditional notion that constitutional questions should be decided only where necessary, the District Court concluded that "since Kentucky law adequately resolves the issues presented in this matter, the Court will not address the constitutional issues looming in the background." App. 2, p. 75, *infra*. Yet the court could not resist repeating what it had said in an earlier case of a somewhat similar nature: "The theories of [state law] liability sought to be imposed upon the manufacture of a role-playing fantasy game would have a devastatingly broad chilling effect on expression of all forms . . . the First Amendment does not hold those whose ideas inspired the crimes to answer for such acts", quoting from its own opinion in a prior case.[4]

After the District Court's Rule 12(b)(6) dismissal order, the Petitioners filed a motion to alter, amend or vacate the court's opinion. They protested that the so-called record was "devoid of any evidence" to support the dismissal of all of Petitioners' state tort law claims. And they asserted that the court had viewed none of the materials or products distributed or sold by the Respondents. The Petitioners' motion also addressed the court's statement that, while it was not deciding any constitutional issue, had it confronted the First Amendment issues it would have held that the First Amendment "does not hold those who inspired the crimes to answer for such acts." App. 2, p. 76, *infra*. On that constitutional ruling, the Petitioners' motion complained that the court had received no evidence and heard none of Petitioners' constitutional arguments.

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[4] *Watters v. TSR, Inc.*, 715 F. Supp. 819, 822 (1989), a summary judgment case where the plaintiff had sought damages based on a suicide of a boy who had read and played the defendant's **Dungeons & Dragons** game board material. The plaintiff, the boy's mother, had brought a wrongful death action under Kentucky state law, and the defendant claimed (1) that its game was privileged under the First Amendment's guarantee of free speech, and (2) that it owed no duty to the boy under Kentucky law and that his suicide was an intervening and superceding cause of death, breaking the chain of causation for Kentucky wrongful death law purposes. The Sixth Circuit affirmed on the grounds of the state law findings, after admonishing the District Court that constitutional issues should be decided "only where necessary." *Watters v. TSR, Inc.*, 904 F.2d 378, 380 (6th Cir. 1990).

The District Court, on June 16, 2000, rendered a short Memorandum Opinion denying this motion. App. 3, p. 78, *infra*. It held that it had not committed any clear error of law in its "reliance on Sixth Circuit and Kentucky state law." The court mentioned but did not respond specifically to Petitioners' claim that the court had "erroneously deprived them of discovery."

And so the District Court left the parents of the three deceased daughters with a thought expressed by the Sixth Circuit in an earlier case: "Tragedies such as this simply defy rational explanation, and courts should not pretend otherwise."[5]

C. The Sixth Circuit Ruling

The Sixth Circuit affirmed all the findings and rulings of the District Court leading to the grant of the Rule 12(b)(6) motions to dismiss the Petitioners' complaint for failure to state a claim on which relief can be granted. While the court could find no decision of Kentucky courts that decided precisely the issues presented in this case, "we are confident that Kentucky appellate courts would uphold the dismissal of James's action, based on their existing decisions." App. 1, p. 7, *infra*. The court then elaborated on Petitioners' negligence claim and their products liability claim, concluding that nothing in Kentucky tort law justified them.[6]

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[5] *Watters v. TSR, Inc.*, 904 F.2d 378, 384 (6th Cir. 1990).

[6] In holding that under Kentucky tort law the Respondents owed no duty of care to the Petitioners or their three daughters, the Sixth

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But the Sixth Circuit was quite ambivalent in its treatment of the First Amendment issues that all parties had briefed and argued before the court. For example, the Petitioners in their merits brief had raised as an issue before the court whether the Respondents' products "are protected by the First Amendment of the United States Constitution." Final brief, p. 2. And they then devoted some 20 pages of the 60-page brief to the claim that "The First Amendment Does Not Bar the Appellants' Claims." They urged that the video games and **The Basketball Diaries** movie were not protected speech within the meaning of the First Amendment and that the First Amendment does not shield such items from liability. The various briefs of the Respondents/Appellees fully briefed and argued to the contrary. And these constitutional issues were fully aired in the oral arguments before the Sixth Circuit.

The Sixth Circuit opinion devotes some 9 pages of its opinion to what it labels as "**First Amendment Problems**." That portion of the opinion begins with an agreement with the District Court that attaching tort liability to the ideas expressed in the Respondents' products would raise "significant constitutional problems under the First Amendment that ought to be avoided." App. 1, p. 20, *infra*. And this portion of the opinion ends with repeating the thought that, "like the district court, we withhold resolution of these constitutional questions given the adequacy of the state law grounds for upholding the dismissal." App. 1, p. 27, *infra*. But the Sixth Circuit then immediately

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Circuit cited and relied upon the famous ruling in *Palsgraf v. Long Island Railroad Co.*, 162 N.E. 99 (N.Y. 1928). App. 1, p. 10, *infra*.

adds that attaching "such tort liability to the ideas and images conveyed by the video games, the movie, and the Internet sites, however, raises grave constitutional concerns that provide yet an additional policy reason not to impose a duty of care between the defendants and the victims in this case." *Id.*

But in between these opening and closing remarks about avoiding the "grave constitutional concerns," the Sixth Circuit's opinion does address and resolve those "grave" concerns. Fairly read, the opinion clearly says that the expressive content of the various media distributed in this case falls into the category of protected free speech. And at one point the Sixth Circuit found "little difficulty in holding that the First Amendment protects video games in the sense uniquely relevant to this lawsuit . . . [but] not to be interpreted as a broad holding on the protected status of video games, but as a recognition of the particular manner in which James seeks to regulate them through tort liability." App. 1, p. 21, *infra*.

At another point in the opinion, the Sixth Circuit seems to say that attaching tort liability to the features of Respondents' products that are distributed to young, impressionable children [like Michael Carneal] may not raise "significant constitutional problems." App. 1, p. 22, *infra*. But to permit tort liability for protected speech that "was not sufficiently prevented from reaching minors" would create difficulties for reviewing courts in determining or evaluating whether the proposed limitations on distribution were found at trial, possibly by a jury, to be "narrowly tailored" enough for constitutional purposes.

Moreover, the Sixth Circuit expressly recognized that the test for determining whether speech constitutes unprotected incitement to violence was that set forth by this Court in *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). The Court there held that states may regulate speech that is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action." The Sixth Circuit then concluded that the violent material in the video games and in the movie in this case "falls short of this threshold" test. App. 1, p. 26, *infra*.

Such is the nature of the rather confusing and contradictory expressions in the Sixth Circuit's opinion. While purportedly withholding judgment on the "grave constitutional claims," the court does in fact resolve those claims. And it does so on an appeal from the grant of the Rule 12(b)(6) motions to dismiss the Petitioners' state tort claims, a procedure whereby Petitioners were given no opportunity to introduce any evidence or proof in support of their state tort claims. Nor were they given any opportunity to submit evidence that might have contradicted any or all of the First Amendment claims that constituted integral parts of the Rule 12(b)(6) motions to dismiss.

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REASONS FOR GRANTING THE WRIT

1. The Sixth Circuit opinion raises important First Amendment issues that affect the safety of school children throughout the land

As this Court is well aware, there has been an unfortunate series of "school shootings" throughout the land. The filing of this lawsuit was followed some eight days later by the much greater slaughter of students in the Columbine High School in Littleton, Colorado. But there have been many more such school shootings throughout the United States, so many in fact that the President and Congress have directed various federal agencies to make in-depth studies of the nature and causes of this phenomenon. One such study by the U.S. Secret Service and the U.S. Department of Education found 37 incidents of school shootings and attacks that have occurred in 27 states from 1974 through June 2000.[7]

That study also indicated that school shootings, a significant component of school violence, have had "a tremendous and lasting effect on the school in which [the shootings] occurred, the surrounding community and the nation as a whole."[8] In short, school shootings are of serious and continuing nationwide concern.

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[7] "The Final Report and Findings of the School Safety Initiative: Implications for the Prevention of School Attacks in the United States," U.S. Secret Service and U.S. Department of Education (May 2002), preface p. ii. This collaborative study by two federal agencies was launched soon after the Columbine shootings, and included the killings in the instant case at Paducah, Ky. The study identified 37 incidents in 27 states of targeted school-based attacks, committed by 41 individuals over a 25-year period. Report, p. 7. The Department of Education reported that nearly 60 million children attend the nation's more than 119,000 schools. *Id.*

Another agency directed by the President and Congress to make such a study was the Federal Trade Commission. In its Year 2000 report, entitled *Marketing Violent Entertainment to Children* (Sept. 2000), p. 57, n. 4, the Commission found that "In the two years leading up to the Columbine tragedy, more than a dozen students or teachers had been killed in six school-related shootings. . . . After [Columbine], school shootings occurred in several other cities [in Georgia, Oklahoma and Michigan]."

[8] *See* "The Final Report and Findings of the School Safety Initiative," cited in note 7, *supra*.

It is noteworthy that this Court has twice denied certiorari in cases where First Amendment defenses had been found inadequate to justify shootings and killings by adults inspired by a book or movie. In *Rice v. Palladin Enterprises*, 128 F.3d 233 (4th Cir. 1997), cert. denied, 523 U.S. 1074 (1998), civil liability was imposed on the publisher of "Hit Man," a contract murder instruction book that had been read and followed by a paid killer. And in *Byers v. Edmondson*, 712 So.2d 681 (La. Ct. App. 1998), cert. denied, 526 U.S. 1005 (1999), a shooting victim was found to have stated a cause of action against a movie maker for negligence and intentional tort, overruling a First Amendment defense, where the violent movie "Natural Born Killers" had inspired and encouraged a shooting spree and armed robbery. Indeed, those two rulings conflict in many respects with the Sixth Circuit's decision in the instant case.

But this is the first case to reach this Court involving "schoolboy shooting" tragedies. It is a suit by the parents of the three young girls shot to death by a classmate, the 14-year-old Michael Carneal. Lacking any statutory or regulatory protection, the parents brought a state law tort action against the various movie, video and Internet producers and distributors whose violent products allegedly taught Michael how to shoot and kill his classmates.[9]

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[9] Cf. *American Amusement Machine Assoc. v. Kendrick*, 244 F.3d 572 (7th Cir. 2001), cert. denied, 534 U.S. 994 (2001) (opinion by Judge Posner outlawing a city ordinance that sought to limit access of minors to video games depicting violence). *See also Planned Parenthood v. American Coalition of Life Activists*, 244 F.3d 1007 (9th Cir. 2001), affirmed in part on rehearing en banc at 290 F.3d 1058 (9th Cir. 2002); now pending on certiorari before this Court, No. 02-563 (involving

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To which the Respondent producers and distributors not only denied their tort law liability but affirmatively claimed that their actions were protected by the Free Speech Clause of the First Amendment. We thus have a modern counterpart of the situation in *New York Times v. Sullivan*, 376 U.S. 254 (1964), which started as a suit under the Alabama civil law of libel and wound up as a decision on the constitutional free speech defense affirmatively raised by the newspaper defendants.

The mere raising of such a constitutional defense should have given the Petitioners a chance to contest it. Constitutional claims and defenses trump state tort law claims and defenses, but the two sets of claims and defenses may not always be identical. That fact, however, permits a court to rest its decision solely on state law grounds, while freely commenting (but not literally deciding) the constitutional issues. That is what happened in this case, and others as well, and it effectively prevents civil claimants from ever pursuing a remedy at law while creating a body of Constitutional law of dubious precedential value.

Most if not all the school shooters have been young, impressionable boys. Michael Carneal, the 14-year-old boy murderer in this case, typically had been vigorously

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attempt to impose civil liability for threats allegedly made by anti-abortion activists against abortion providers, accusing publicly-named providers of Nuremberg-like crimes against humanity); *Pahler v. Slayer*, Cal. Super. Ct., San Luis Obisco County, (Oct. 29, 2001, available at 2001 WL 1736476) (involving an attempt to impose civil liability against a rock group for deaths allegedly caused by the group's violent, depressing and death-ridden lyrics).

importuned by the Respondents to purchase and view their video, movie and Internet products. Many of those products taught these boys, among other things, how to be accurate marksmen and (in **The Basketball Diaries** movie) how to shoot to kill their classmates and teachers. Petitioners propose to introduce scientific causal evidence of the physiological and psychological impact of these adult-rated products on Michael Carneal as well as evidence of highly orchestrated marketing campaigns designed to entice children to buy them. When called to account for providing such products, the producers and distributors assert their full rights under the Free Speech Clause of the First Amendment. They proclaim that the First Amendment stands as an absolute and independent bar to the imposition of tort liability or any other kind of limitation. Several reasons for granting certiorari are thereby created:

1. A definitive ruling by this Court is needed to determine, in the context of a prolonged national crisis of school shootings, whether the First Amendment confers an absolute right on the Respondents to peddle (via commercial speech) their gun shooting and obscenity wares to the most vulnerable segment of our population. The lethal potential of these products would appear to outweigh any social utility or communication that might plausibly be imputed to them.

Indeed, this Court has long recognized that violence and obscenity, when directed to an impressionable juvenile audience fall within those limited areas of "free speech" that are "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942); *see also R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992) ("these areas of speech can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content* (obscenity, defamation, etc.) (emphasis in original)." The time has now come to determine whether the likes of **The Basketball Diaries** can be regulated or subjected to civil liability because of its "constitutionally proscribable content."

2. A second reason to grant certiorari in this case is to determine – in the context of a nationwide school shooting crisis – whether the Respondents, in targeting impressionable young boys to buy and view their products and movies, could have foreseen the lethal consequences.

Petitioners believe that evidence will show that Respondents' extensive and sophisticated marketing techniques, plus their awareness of the extensive news coverage of these multiple school shootings, must have alerted them to the dangers of targeting young boys with violent gun-shooting movies and obscenities – all of which possessed "constitutionally proscribable content." While they did not know young Michael Carneal in particular, or his gun-shooting proclivities, they knew or should have known that there are many potential Michael Carneals in their targeted sales and viewing audiences.

Indeed, the entertainment industry must be aware of the Joint Statement of the leaders of the public health community, issued on July 26, 2000, that found that the industry is "wrong" in assuming that (1) violent programming is harmless because no studies exist that prove a connection between violent entertainment and aggressive behavior in children, and (2) young people know that television, movies, and video games are simply fantasy.[10] Rather, said the Report:[11]

> At this time, well over 1000 studies – including reports from the Surgeon General's office, the National Institute of Mental Health, and numerous studies conducted by leading figures within our medical and public health organizations – our own members – point overwhelmingly to a causal connection between media violence and aggressive behavior in some children. The conclusion of the public health community, based on over 30 years of research, is that viewing entertainment violence can lead to increases in aggressive attitudes, values and behavior, particularly in children.
>
> Its effects are measurable and long lasting. Moreover, prolonged viewing of media violence can lead to desensitization toward violence in real life.

Professional opinion thus appears to support the proposition that the content of Respondents' movies, games and obscenities, when viewed by impressionable young boys like Michael, can result in death and injury to other young school children and their teachers and principals. Obviously, protection of children and teachers in public schools should be of prime concern in assessing the First Amendment consequences of any book, movie, video game, or Internet program. *See Ginsburg v. New York*, 390 U.S. 629 (1968), upholding a ban on the sale of sexually oriented material to minors, even though the material in question was entitled to First Amendment protection with respect to adults.

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[10] Joint Statement on the Impact of Entertainment Violence on Children – Congressional Public Health Summit (July 26, 2000). This Report was signed by (1) the President of the American Academy of Child and Adolescent Psychiatry, (2) the President of the American Academy of Pediatrics, (3) the Deputy Chief Executive Officer of the American Psychological Association, and (4) the Executive Vice President of the American Medical Association.

[11] *Ibid*, at p. 1.

To allow the constitutional free speech rulings of the Sixth Amendment to remain unreviewed and uncorrected is to give those rulings a dangerous and unfortunate precedential value. And such rulings will remain as a warning that if there is any price to be paid as a consequence of the exercise of Respondents' free speech rights, such price must be borne solely by the families of the dead victims. *See* Schauer, *Uncoupling Free Speech*, 92 Col. L. Rev. 1321, 1322 (1992) ("existing understandings of the First Amendment are based on the assumption that, because a price must be paid for free speech, it must be the victims of harmful speech who are to pay it. . . . If free speech benefits us all, then ideally we all ought to pay for it, not only those who are the victims of harmful speech").

2. The refusal of the courts below to allow any factual development of the common law and First Amendment issues presents important procedural questions

The Sixth Circuit's comments and rulings concerning both the tort aspects and the impact of the Free Speech Clause on the shooting deaths in this case are unfortunately devoid of a fully developed factual base. That void is traceable to the District Court's grant of a Rule 12(b)(6) motion to dismiss the Petitioners' state law tort claims. In that motion, the Respondents not only challenged the sufficiency of the tort claims but also asserted that the challenged actions of the Respondents were but elements of their First Amendment free speech rights.

Petitioners took vigorous exception to such free speech claims. But when they sought leave to develop and present a factual basis for their constitutional objections, the District Court repeatedly denied their request. The court then dismissed Petitioners' state tort claim complaint for failure, in Rule 12(b)(6) words, "to state a claim upon which relief can be granted." Nothing was said about Respondents' free speech claims.

Such claims were neither approved nor disapproved, but were left intact for such further use as the parties might wish. Nor were those constitutional claims ever buttressed by factual developments or findings.

The Sixth Circuit did not seem bothered by this lack of a factual base for the important free speech issues. Rather unfairly, it proceeded to address and resolve many of those issues, based upon the opposing written and oral arguments of the parties and supplemented by whatever facts the parties may have presented in proper form. Presumably, the court thought it was just indulging in "dicta." But the "dicta" was so strong that the Sixth Circuit's remarks can be used as precedential rulings on the First Amendment aspects of this national shooting tragedy. And the Petitioners will have been deprived of any chance to have developed any factual basis for their opposing constitutional views. By this judicial technique of avoiding but still resolving important Constitutional questions, Courts of Appeal could create citable and important but unreviewable precedents. Without any factual base that would permit this Court's review of such "dicta" rulings, this Court's authority as the prime interpreter of the Constitution is abrogated.

If this Court agrees that more proven facts are necessary to resolve this important First Amendment case, Federal Rule 12(b)(6) itself provides a basis for remand. Rule 12(b) goes on to say that if "matters outside the pleading are presented" a Rule 12(b)(6) motion "shall be treated as one for summary judgment and disposed of as provided in Rule 56." Thus a summary judgment procedure might be ordered to receive and evaluate the necessary facts. Or some other remand procedure might be employed.

In any event, the free speech rulings of the Sixth Circuit are in dire need of review and/or correction. The prolonged series of school shootings should no longer continue without authoritative and fact-bound rulings, first by the lower courts and then by this Court.

◆

CONCLUSION

For all the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

MICHAEL A. BREEN
Counsel of Record
KERRY S. MORGAN
1700 Destiny Lane
Bowling Green, KY 42104
270-782-3030

EUGENE GRESSMAN
UNIV. OF NORTH CAROLINA
SCHOOL OF LAW
Chapel Hill, NC 27599-3380
919-962-3688

Counsel for Petitioners

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RECOMMENDED FOR FULL-TEXT PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Joe James, et al., Plaintiffs-Appellants, v. Meow Media, Inc., et al., Defendants-Appellees.	No. 00-5922

Appeal from the United States District Court
for the Western District of Kentucky at Paducah.
No. 99-00096 – Edward H. Johnstone,
Senior District Judge.

Argued: November 28, 2001

Decided and Filed: August 13, 2002

Before: GUY and BOGGS, Circuit Judges; and CARR, District Judge.[*]

COUNSEL

ARGUED: Michael A. Breen, MIKE BREEN ATTORNEYS AT LAW, Bowling Green, Kentucky, for Appellants. Paul M. Smith, JENNER & BLOCK, Washington, D.C., Kevin T. Baine, WILLIAMS & CONNOLLY, Washington,

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[*] The Honorable James G. Carr, United States District Judge for the Northern District of Ohio, sitting by designation.

D.C., for Appellees. **ON BRIEF:** Michael A. Breen, Kerry S. Morgan, MIKE BREEN ATTORNEYS AT LAW, Bowling Green, Kentucky, for Appellants. Paul M. Smith, Deanne E. Maynard, David C. Belt, Elizabeth A. Cavanagh, JENNER & BLOCK, Washington, D.C., Kevin T. Baine, WILLIAMS & CONNOLLY, Washington, D.C., Mark P. Bryan, BRYANT & KAUTZ, Paducah, Kentucky, Steven C. Jackson, JACKSON & JAGGERS, Paducah, Kentucky, Joel N. Kreizman, EVANS, OSBORNE & KREIZMAN, Ocean, New Jersey, Gerald O. Sweeney, Jr., John T. Williams, LORD, BISSELL & BROOK, Chicago, Illinois, Elizabeth U. Mendel, Richard H. C. Clay, Patrick Shane O'Bryan, WOODWARD, HOBSON & FULTON, Louisville, Kentucky, John David Cole, Sr., Matthew P. Cook, COLE, MOORE & BAKER, Bowling Green, Kentucky, Paul E. Salamanca, Lexington, Kentucky, D. Wade Cloud, Jr., James T. Drakeley, HIERSCHE, MARTENS, HAYWARD, DRAKELEY & URBACH, Addison, Texas, Stephen E. Smith, Jr., McMURRY & LIVINGSTON, Paducah, Kentucky, V. Thomas Fryman, Jr., GREENEBAUM, DOLL & McDONALD, Lexington, Kentucky, Mark S. Riddle, GREENEBAUM, DOLL & McDONALD, Louisville, Kentucky, Barry R. Ostrager, Mary E. McGarry, SIMPSON, THACHER & BARTLETT, New York, New York, Ronald G. Sheffer, SHEFFER, HUTCHINSON & KINNEY, Louisville, Kentucky, for Appellees.

OPINION

BOGGS, Circuit Judge. On December 1, 1997, Michael Carneal walked into the lobby of Heath High School in Paducah, Kentucky, and shot several of his fellow students, killing three and wounding many others. The parents and estate administrators of Carneal's victims – Jessica James, Kayce Steger, and Nicole Hadley – (hereinafter collectively referred to as "James") appeal the judgment of the district court dismissing, for failing to state claims on which relief could be granted, their actions against several video game, movie production, and internet content-provider firms. According to James's complaint, Carneal regularly played video games, watched movies, and viewed internet sites produced by the defendant firms. These activities, James argues, "desensitized" Carneal to violence and "caused" him to kill the students of Heath High School. James claims that the distribution of this material to impressionable youth like Carneal constitutes actionable negligence under Kentucky law, entitling James to recover wrongful death damages from the distributing firms. Moreover, James contends that the defendant firms purveyed defective "products," namely the content of video games, movies, and internet sites, triggering strict product liability under Kentucky law.

The defendant firms argue that they owe no duty to protect third parties from how players, watchers or viewers process the ideas and images presented in their video games, movies, and internet sites. Specifically, the defendants contend that Carneal's actions were not sufficiently foreseeable to trigger the defendants' liability. Even if they were to owe such a duty to protect third parties from the consumers of their ideas and images, the defendants argue that Carneal's independent decision to kill his fellow students constitutes a superseding cause of the claimed damages and defeats the proximate cause element of James's *prima facie* case. The defendants further contend that tort liability for the non-defamatory ideas and images communicated in their respective media would raise significant First Amendment questions that ought to be avoided. Finally, the defendants note that James's theory of product liability is flawed as they have not distributed "products" under Kentucky law.

For the reasons set forth below, we affirm the district court's dismissal of James's actions.

I

On December 1, 1997, Michael Carneal brought a .22-caliber pistol and five shotguns into the lobby of Heath High School in Paducah, Kentucky. At the time, Carneal was a 14-year-old freshman student at the school. Upon his arrival, Carneal began shooting into a crowd of students, wounding five. His shots killed an additional three: Jessica James, Kayce Steger, and Nicole Hadley. Carneal was arrested and convicted of murdering James, Steger, and Hadley.

Subsequent investigations revealed that Carneal regularly played "Doom," "Quake," "Castle Wolfenstein," "Redneck Rampage," "Nightmare Creatures," "Mech Warrior," "Resident Evil," and "Final Fantasy," which are interactive computer games that, in various ways, all involve the player shooting virtual opponents. Carneal also possessed a video tape containing the movie, "The Basketball Diaries," in a few minutes of which the high-school-student protagonist dreams of killing his teacher and several of his fellow classmates. Investigators examined Carneal's computer and discovered that he had visited "www.persiankitty.com," which appears to catalogue and link to sites with sexually-suggestive material. It also appeared that through "www.adultkey.com," a site operated by Network Authentication Systems and designed to restrict access to certain websites to viewers over certain ages, Carneal was granted age verification sufficient to visit many other pornographic sites.

The parents, who also are the estate administrators, of James, Steger, and Hadley filed this action in the United States District Court for the Western District of Kentucky. James's complaint named as defendants the companies that produce or maintain the above-mentioned movie, video games, and internet sites. James stated essentially three causes of action against the defendants. First, James alleged that the defendants had been negligent in that they either knew or should have known that the distribution of their material to Carneal and other young people created an unreasonable risk of harm to others. James alleged that exposure to the defendants' material made young people insensitive to violence and more likely to commit violent acts. But for Carneal's steady diet of the defendants' material, James contended, Carneal would not have committed his violent acts.

Second, James asserted that the video game cartridges, movie cassettes, and internet transmissions that the defendants produced and distributed were "products" for purposes of Kentucky product liability law. According to James, the violent features of the movie, games, and internet sites were product defects. The defendants, as producers and distributors of the "products," are strictly liable under Kentucky law for damages caused by such product defects.

The third claim that James raised was that some of the defendants' conduct had violated the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* According to James, the defendant firms that maintained internet sites engaged in a pattern of racketeering activity by distributing obscene material to minors.

The defendants moved to dismiss all of James's actions for failing to state any claim on which relief could be granted. *See* Fed. R. Civ. P. 12(b)(6). The district court granted the defendants' motion. The district court held that Carneal's actions were not sufficiently foreseeable to impose a duty of reasonable care on the defendants with regard to Carneal's victims. Alternatively, the district court held that even if such a duty existed, Carneal's actions constituted a superseding cause of the victims' injuries, defeating the element of proximate causation notwithstanding the defendants' negligence. With regard to James's second cause of action, the district court determined that the "thoughts, ideas and images" purveyed by the defendants' movie, video games, and internet sites were not "products" for purposes of Kentucky law and therefore the defendants could not be held strictly liable for any alleged defects. Finally, the district court held that James had not stated a viable RICO claim against the defendant internet firms. Among other reasons, the district court explained that James had alleged RICO predicate acts, but had failed to identify an organization that had been corrupted, and had failed to show any injury to "business or property" as required for standing under RICO.

James now appeals the district court dismissal of his negligence and product liability claims. We can discern no argument in James's brief assigning error to the district court's dismissal of his RICO claim, and therefore consider such an argument waived. Accordingly, this appeal raises questions of only Kentucky law.

II

In this case, we review a district court's dismissal of a case for failure to state a claim on which relief may be granted. Fed R. Civ. P. 12(b)(6). In deciding a Rule 12(b)(6) motion to dismiss, the district court is required to assume that all allegations in the complaint are true and to decide whether those allegations provide a basis for legal relief. *See Mayer v. Mylod,* 988 F.2d 635, 638 (6th Cir. 1993). "A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957). This court reviews *de novo* a district court's granting of such a motion to dismiss. *Helfrich v. PNC Bank, Kentucky, Inc.,* 267 F.3d 477, 480-81 (6th Cir. 2001).

The legal questions under review in this case are questions of Kentucky law. When faced with the resolution of these state law issues, our inquiry is in part hypothetical. Specifically, we are charged to decide these questions of Kentucky state law as Kentucky state courts would. *See Miles v. Kohli & Kaliher Assocs.,* 917 F.2d 235, 241 (6th Cir. 1990). Although we can find no decision of Kentucky courts that decides precisely the issues presented in this case, we are confident that Kentucky appellate courts would uphold the dismissal of James's action, based on their existing decisions. We elaborate on our conclusion below, considering first James's negligence action and second his products liability action.

III

James contends that the defendants in this case acted negligently, perhaps in producing, but at least in distributing to young people, their materials. It was this negligence, according to James, that caused Carneal to undertake his violent actions and that thereby caused the deaths of the plaintiffs' daughters. In order to establish an actionable tort under Kentucky law, the plaintiff must establish that the defendant owed a duty of care to the plaintiff, that the defendant breached that duty of care, and that the *defendant's breach* was the proximate cause of the plaintiff's damages.

A. The Existence of a Duty of Care

The district court held that James's allegations, even if assumed to be true, failed to establish the first element of the *prima facie* case. Specifically, the district court determined that the defendants were under no duty to protect James, Steger, and Hadley from Carneal's actions. James argues that the district court erred as a matter of Kentucky law in this regard.

The "existence of a duty of care" as an element of a tort cause of action is of relatively recent vintage. At early English common law, the existence of a duty of care was not considered as an element of an actionable tort. Then, tort law attached strict liability for any damages that resulted from "wrongful acts." Prosser on Torts § 53. The requirement that the plaintiff establish that he was owed a specific duty of care by the defendant came with the advent of negligence in place of strict liability. *See generally* Percy H. Winfield, *Duty in Tortious Negligence,* 34 Colum. L. Rev. 41 (1934). As a separate basis of liability, negligence was simply too broad, according to later English courts. Accordingly, the concept of limited duty disciplined the concept of negligence, requiring the plaintiff to establish a definite legal obligation.

At first, the limited duty of care concerned the persons to whom a defendant owed an obligation of care. *See, e.g., Shore v. Town of Stonington,* 444 A.2d 1379 (Conn. 1982) (holding that a police officer owed no duty to protect a citizen who was killed by a drunk driver that the officer had stopped, but released). The dilemma was that it became nearly impossible categorically to demarcate the universe of people to whom a person would owe a duty to abstain from negligence. With regard to the existence of duty between specific persons, the answer always was dependent on the circumstances.

Kentucky courts resolved this dilemma by establishing a "universal duty of care." *Grayson Fraternal Order of Eagles v. Claywell,* 736 S.W.2d 328 (Ky. 1987); *M&T Chems., Inc. v. Westrick,* 525 S.W.2d 740 (Ky. 1974); *Greyhound Corp. v. White,* 323 S.W.2d 578 (Ky. 1959). Under the universal duty of care, "every person owes a duty to every other person to exercise ordinary care in his activities to prevent foreseeable injury." *Grayson,* 736 S.W.2d at 332. James argues that Kentucky's universal duty of care would foreclose the defendants' argument that they had no duty to protect James, Steger, and Hadley. It is clear to us, however, that Kentucky's rule of a universal duty of care simply recognizes the obvious in determining the existence of a duty of care. Of course, there are conceivable circumstances under which there would be legally enforceable duties to act without negligence between any two people. What Kentucky courts have recognized through the "universal duty of care" rule is that the existence of a duty of care is circumstantially limited: the duty is to exercise ordinary care to prevent *foreseeable* harm.

Thus, Kentucky courts have held that the determination of whether a duty of care exists is whether the harm to the plaintiff resulting from the defendant's negligence was "foreseeable." Foreseeability is an often invoked, but not terribly well defined, concept in the common law of tort. Some common law tort regimes use foreseeability as the standard for determining proximate causation. *See, e.g., Fu v. State,* 643 N.W.2d 659, 669 (Neb. 2002); *Haliw v. City of Sterling Heights,* 627 N.W.2d 581, 588 (Mich. 2001). *Compare Bodkin v. S.P., Inc.,* 768 N.E.2d 194, 202 (Ill. Ct. App. 2002) (attempting to identify different forms of foreseeability for the proximate cause and the existence of a duty inquiries). Kentucky's particular use of foreseeability in the duty inquiry finds its roots in perhaps the most famous application of the foreseeability principle. In *Palsgraf v. Long Island Railroad Co.,* 162 N.E. 99 (N.Y. 1928), then-Judge Cardozo determined that the defendant's duty is to avoid "risks reasonably to be perceived." *Id.* at 100. As every former law student remembers, the plaintiff in *Palsgraf* had bought a train ticket to travel to the Rockaways for the afternoon and was waiting on the station platform. Two men were rushing to catch a departing train, one easily hopped on board and the other struggled to pull himself onto the rear car. A conductor on the train pulled him on board, but in the process, the struggling passenger dropped onto the rails the brown-paper package he was carrying. The package was full of fireworks and exploded. The explosion overturned a large set of scales on the platform, which struck Palsgraf, and Palsgraf sued the railroad for her injuries.

Cardozo determined that the railroad simply did not owe a duty to Palsgraf to protect against *the injury that she suffered.* For Cardozo, the harm that Palsgraf suffered was not sufficiently probable that the railroad employees could have been expected to anticipate it occurring from their actions. Cardozo's reasoning, although implying that Palsgraf was the unforeseeable plaintiff, rested on the improbability of the *harm* that she suffered arising from the defendant's particular actions. *Id.* at 101. For Cardozo too, the existence of a duty of care was a creature of circumstance.

Cardozo's opinion in *Palsgraf,* while cited as the cornerstone of the American doctrine of a limited duty of care, has been criticized for its conclusory reasoning regarding whether Palsgraf's harm really was sufficiently unforeseeable. *See* William L. Prosser, Palsgraf *Revisited,* 52 Mich. L. Rev. 1, 7-9 (1953). Such conclusory reasoning has been endemic in the jurisprudence of determining duty by assessing foreseeability. Courts often end up merely listing factual reasons why a particular harm, although having materialized, would have appeared particularly unlikely in advance and then simply asserting that the harm was too unlikely to be foreseeable and to create a duty to exercise due care in protecting against it. What has not emerged is any clear standard regarding what makes a projected harm too improbable to be foreseeable.

Kentucky courts have struggled with the formless nature of this inquiry. At bottom, Kentucky courts have conceded, deciding the existence of a duty of care is "essentially a policy determination." *Mullins v. Commonwealth Life Ins. Co.,* 839 S.W.2d 245, 248 (Ky. 1992); *Sheehan v. United Servs. Auto. Ass'n,* 913 S.W.2d 4, 6 (Ky. Ct. App. 1996). Rather than the sophisticated weighing of probabilities, the content of that policy determination "is but a conclusion of whether a plaintiff's interests are entitled to

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legal protection against the defendant's conduct." *Sheehan,* 913 S.W.2d at 6.

The parties in this case have argued at length over whether the foreseeability inquiry required to determine the existence of a duty of care is a pure question of law for the court or a question of fact that should generally be submitted to a jury. Under Kentucky law, it is clear that the existence of a duty of care to the plaintiff, and its underlying foreseeability inquiry, is a pure question of law for the court. *Mullins,* 839 S.W.2d at 248 ("The question of duty presents an issue of law"); *Sheehan,* 913 S.W.2d at 6. *See also* 57A Am.Jur.2d *Negligence* § 20 (listing other jurisdictions in which the duty inquiry is a question of law).[1] The allocation of responsibility for determining this question to the courts, rather than to juries, reveals that the duty inquiry contains an important role for considering the policy consequences of imposing liability on a certain class of situations. Essentially, the foreseeability inquiry requires courts to determine questions inexorably tied to the ultimate question of whether the defendant was negligent. After all, the probability of the harm is a significant factor in traditional assessment of negligence.[2] By placing the foreseeability analysis in the hands of courts, the existence of duty element of the *prima facie* case serves as a gatekeeper for the otherwise extremely broad concept of negligence.

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[1] James directs us to several cases that, he argues, stand for the proposition that foreseeability of harm is a question of fact for the jury under Kentucky law, when reasonable minds can differ. Most of the cited cases, however, pertain to the question of foreseeability in the context of proximate causation. *Watts v. K, S, & H,* 957 S.W.2d 233, 239 (Ky. 1997) ("The question of foreseeable risk is covered by the usual instruction relating to proximate cause."). Proximate cause, and *its* underlying foreseeability inquiry, is a question of fact for the jury. *See* Part III.B. *infra.* The only other Kentucky case cited for this proposition has nothing to do with the common law of tort. *See Finney Co. v. Monarch Constr. Co.,* 670 S.W.2d 857, 862-63 (Ky. 1984) (discussing the concept of reasonably foreseeable reliance in a breach of contract case). James also directs us to *Workman v. Columbia Nat. Res.,* 864 F.Supp. 638 (E.D. Ky. 1994), which holds that foreseeability for determining the existence of a duty is a question of fact for the jury. The federal district court in *Workman,* however, erred in its interpretation of Kentucky law on this issue, and we choose to follow the clear rulings of the Kentucky courts in *Mullins* and *Sheehan.*

Thus, we are called, as best we can, to implement Kentucky's duty of care analysis in this case. Our inquiry is whether the deaths of James, Steger, and Hadley were the reasonably foreseeable result of the defendants' creation and distribution of their games, movie, and internet sites. Whether an event was reasonably foreseeable is not for us to determine with the assistance of hindsight. *Mitchell v. Hadl,* 816 S.W.2d 183, 186 (Ky. 1991). The mere fact that the risk may have materialized does little to resolve the foreseeability question.

Kentucky courts, in resolving foreseeability questions, have consistently inquired into the relative likelihood of the injuries produced. Of particular interest in this case are cases in which plaintiffs have sought to hold defendants liable for the actions of third parties, allegedly enabled or encouraged by the defendants. A line of cases in this vein concerns dram shops. In *Grayson,* the Kentucky

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[2] Learned Hand's famous conception of negligence would hold conduct negligent if the harm that the conduct threatens to create, discounted by the *ex ante* probability of the harm's non-occurrence, outweighs the utility created by the conduct. *See United States v. Carroll Towing Co.,* 159 F.2d 169 (2d Cir. 1947).

Supreme Court held that an automobile accident injuring third parties was a reasonably foreseeable result of the negligent act of serving alcohol to an intoxicated individual. 736 S.W.2d at 332. In contrast, the court later held that an intoxicated patron fighting with and shooting a fellow customer was simply not a foreseeable result of continuing to serve the patron alcohol. *Isaacs v. Smith,* 5 S.W.3d 500, 502 (Ky. 1999). According to the court, the violent fighting and shooting was so much less likely a result from the serving of alcohol than the negligent operation of a motor vehicle that it was not reasonably foreseeable. *Ibid.* Accordingly, the court held that dram shops, although negligent in serving alcohol to the obviously intoxicated, do not have a duty to protect third parties from the intentional violent acts of their intoxicated patrons. *Ibid.*

Intentional violence is less likely to result from intoxication than negligent operation of a motor vehicle. Yet, the Kentucky Supreme Court never makes clear how unlikely is too unlikely for a particular type of harm to be unforeseeable. The cases do not create a principle, portable to the context of this case, for evaluating the probability of harm.

This court has encountered this foreseeability inquiry under Kentucky law before in a situation similar to this case. In *Watters v. TSR, Inc.,* 904 F.2d 378 (6th Cir. 1990), the mother of a suicide victim sued TSR for manufacturing the game "Dungeons and Dragons." The suicide victim regularly played the game. The mother contended that the game's violent content "desensitized" the victim to violence and caused him to undertake the violent act of shooting himself in the head. We held that the boy's suicide was simply not a reasonably foreseeable result of producing the game, notwithstanding its violent content. To have held otherwise would have been "to stretch the concepts of foreseeability and ordinary care to lengths that would deprive them of all normal meaning." *Id.* at 381.

Foreseeability, however, is a slippery concept. Indeed, it could be argued that we ourselves confused it with some concept of negligence. We noted in *Watters*: "The defendant cannot be faulted, obviously, for putting its game on the market without attempting to ascertain the mental condition of each and every prospective player." *Ibid.* We almost appeared to say that the costs of acquiring such knowledge would so outweigh the social benefits that it would not be negligent to abstain from such an investigation. We can put the *foreseeability* point a little more precisely, however. It appears simply impossible to predict that these games, movie, and internet sites (alone, or in what combinations) would incite a young person to violence. Carneal's reaction to the games and movies at issue here, assuming that his violent actions were such a reaction, was simply too idiosyncratic to expect the defendants to have anticipated it. We find that it is simply too far a leap from shooting characters on a video screen (an activity undertaken by millions) to shooting people in a classroom (an activity undertaken by a handful, at most) for Carneal's actions to have been reasonably foreseeable to the manufacturers of the media that Carneal played and viewed.

At first glance, our conclusion also appears to be little more than an assertion. Mental health experts could quite plausibly opine about the manner in which violent movies and video games affect viewer behavior. We need not stretch to imagine some mixture of impressionability and emotional instability that might unnaturally react with the violent content of the "Basketball Diaries" or "Doom."

Of course, Carneal's reaction was not a normal reaction. Indeed, Carneal is not a normal person, but it is not utter craziness to predict that someone like Carneal is out there.

We return, however, to the Kentucky court's observation that the existence of a duty of care reflects a judicial policy judgment at bottom. From the Kentucky cases on foreseeability, we can discern two relevant policies that counsel against finding that Carneal's violent actions were the reasonably foreseeable result of defendants' distribution of games, movies, and internet material.

1. The Duty to Protect Against Intentional Criminal Actions

First, courts have held that, except under extraordinary circumstances, individuals are generally entitled to assume that third parties will not commit intentional criminal acts. *See* Restatement (Second) of Torts § 302B, cmt. d ("Normally the actor has much less reason to anticipate intentional misconduct than he has to anticipate negligence. In the ordinary case he may reasonably proceed upon the assumption that others will not interfere in a manner intended to cause harm to anyone. This is true particularly where the intentional conduct is a crime, since under ordinary circumstances it may reasonably be assumed that no one will violate the criminal law."). *See also Gaines-Tabb v. ICI Explosives USA, Inc.*, 995 F. Supp. 1304 (D. Okla. 1996) (holding that fertilizer and blasting cap manufacturers were not liable for Murrah Federal Building bombing, as they were entitled to believe that third parties would not engage in intentional criminal conduct); *Henry v. Merck & Co.*, 877 F.2d 1489, 1493 (10th Cir. 1989). The reasons behind this general rule are simple enough. The first reason is a probabilistic judgment that foreseeability analysis requires. Individuals generally are significantly deterred from undertaking intentional criminal conduct given the sanctions that can follow. The threatened sanctions make the third-party intentional criminal conduct sufficiently less likely that, under normal circumstances, we do not require the putative tort defendant to anticipate it. Indeed, this statistical observation explains the distinction drawn by Kentucky courts in the dram shop liability cases.

The second reason is structural. The system of criminal liability has concentrated responsibility for an intentional criminal act in the primary actor, his accomplices, and his co-conspirators. By imposing liability on those who did not endeavor to accomplish the intentional criminal undertaking, tort liability would diminish the responsibility placed on the criminal defendant. The normative message of tort law in these situations would be that the defendant is not entirely responsible for his intentional criminal act.

Does this case involve the extraordinary circumstances under which we would require the defendants to anticipate a third party's intentional criminal act? Kentucky courts have found such circumstances when the tort defendant had previously developed "a special relationship" with the victim of a third-party intentional criminal act. *See, e.g., Fryman v. Harrison,* 896 S.W.2d 908, 910 (Ky. 1995) (requiring that the victim be in state custody in order to trigger governmental duty to protect her from third-party violence as a matter of Kentucky tort law). *Cf. DeShaney v. Winnebago County Dep't of Soc. Serv.,* 489 U.S. 189 (1989) (articulating the special relationship test to trigger a governmental duty to protect persons from private violence under the Fourteenth Amendment). This duty to protect can be triggered by placing the putative plaintiff in custody or by taking other affirmative steps that disable the plaintiff from protecting himself against third-party intentional criminal acts. Of course, a special relationship can be created by a contract between the plaintiff and the defendant. Finally, some states have imposed a duty to protect others from third-party intentional criminal acts on members of discrete professions who become aware of the third-party's intention to engage in criminal conduct against a specific person. *See Tarasoff v. Board of Regents of the Univ. of Cal.*, 551 P.2d 334 (Cal. 1976); *Evans v. Morehead Clinic,* 749 S.W.2d 696 (Ky. Ct. App. 1988).

We can find nothing close to a "special relationship" in this case. The defendants did not even know James, Steger, and Hadley prior to Carneal's actions, much less take any affirmative steps that disabled them from protecting themselves.

Courts have held, under extremely limited circumstances, that individuals, notwithstanding their relationship with the victims of third-party violence, can be liable when their affirmative actions "create a high degree of risk of [the third party's] intentional misconduct." Restatement of Torts (Second) § 302B, cmt. e.H. Generally, such circumstances are limited to cases in which the defendant has given a young child access to ultra-hazardous materials such as blasting caps, *Vills v. City of Cloquet,* 138 N.W. 33 (Minn. 1912), or firearms. *Spivey v. Sheeler,* 514 S.W.2d 667 (Ky. 1974). Even in those cases, courts have relied on the third party's severely diminished capacity to handle the ultra-hazardous materials. With older third parties, courts have found liability only where defendants have vested a particular person, under circumstances that made his nefarious plans clear, with the tools that he then quickly used to commit the criminal act. *See Meers v. McDowell,* 62 S.W. 1013 (Ky. 1901). Arguably, the defendants' games, movie, and internet sites gave Carneal the ideas and emotions, the "psychological tools," to commit three murders. However, this case lacks such crucial features of our jurisprudence in this area. First, the defendants in this case had no idea Carneal even existed, much less the particular idiosyncracies of Carneal that made their products particularly dangerous in his hands. In every case that this court has discovered in which defendants have been held liable for negligently creating an unreasonably high risk of third-party criminal conduct, the defendants have been specifically aware of the peculiar tendency of a particular person to commit a criminal act with the defendants' materials.

Second, no court has ever held that ideas and images can constitute the tools for a criminal act under this narrow exception. Beyond their intangibility, such ideas and images are at least one step removed from the implements that can be used in the criminal act itself. In the cases supporting this exception, the item that the defendant has given to the third-party criminal actor has been the direct instrument of harm.

2. First Amendment Problems

Moreover, we are loath to hold that ideas and images can constitute the tools for a criminal act under this exception, or even to attach tort liability to the dissemination of ideas. We agree with the district court that attaching tort liability to the effect that such ideas have on a criminal actor would raise significant constitutional problems under the First Amendment that ought to be avoided. *See NLRB v. Catholic Bishop of Chicago,* 440 U.S. 490, 500 (1979) (suggesting that non-constitutional questions of law ought to be construed, where possible, to avoid significant constitutional problems). Although the plaintiffs' contentions in this case do not concern the absolute proscription of the defendants' conduct, courts have made clear that attaching tort liability to protected speech can violate the First Amendment. *See New York Times v. Sullivan,* 376 U.S. 254, 265 (1964) ("Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute.").

The first inquiry is whether the defendants' activity constitutes protected speech under the First Amendment. One thing is perfectly clear to this court: the plaintiffs' argument does not seek to attach liability to the cassettes and cartridges distributed by the defendants, but the ideas and images communicated to Carneal by those products. Although the defendants' products may be a mixture of expressive and inert content, the plaintiffs' theory of liability isolates the expressive content of the defendants' products.

Expression, to be constitutionally protected, need not constitute the reasoned discussion of the public affairs, but may also be for purposes of entertainment. *See Time, Inc. v. Hill,* 385 U.S. 374, 388 (1967). Clearly, the various media distributed in this case fall along a spectrum of expressive content. It is long settled that movies can constitute protected speech. *Joseph Burstyn, Inc. v. Wilson,* 343 U.S. 495, 501 (1952). Of more recent, but no less definitive, resolution is that internet sites are similarly entitled to protection. *See Reno v. American Civil Liberties Union,* 521 U.S. 844 (1997) (striking down the Communications Decency Act regulating indecent material on the internet). The constitutional status of video games has been less litigated in federal courts. Yet most federal courts to consider the issue have found video games to be constitutionally protected. *American Amusement Mach. Ass'n v. Kendrick,* 244 F.3d 572 (7th Cir. 2001) (Posner, J.); *Wilson v. Midway Games, Inc.,* 198 F. Supp. 2d 167 (D. Conn. 2002); *Sanders v. Acclaim Entm't, Inc.,* 188 F. Supp. 2d 1264 (D. Colo. 2002). *But see Interactive Digital Software Ass'n v. St. Louis County, Mo.,* 200 F. Supp. 2d 1126 (E.D. Mo. 2002) (holding that video games were not protected expression under the First Amendment).

Extending First Amendment protection to video games certainly presents some thorny issues. After all, there are features of video games which are not terribly communicative, such as the manner in which the player controls the game. The plaintiffs in this case, however, complain about none of those non-expressive features. Instead, they argue that the video game, somehow, communicated to Carneal a disregard for human life and an endorsement of violence that persuaded him to commit three murders. Because the plaintiffs seek to attach tort liability to the communicative aspect of the video games produced by the defendants, we have little difficulty in holding that the First Amendment protects video games in the sense uniquely relevant to this lawsuit. Our decision here today should not be interpreted as a broad holding on the protected status of video games, but as a recognition of the particular manner in which James seeks to regulate them through tort liability.

To say that the features of the defendants' products of which the plaintiffs complain are protected by the First Amendment is not necessarily to say that attaching tort liability to those features raises significant constitutional problems. The plaintiffs' argument is more nuanced: they do not seek to hold the defendants responsible merely for distributing their materials to anyone, but to young, impressionable children or, even more specifically, to Carneal. The protections of the First Amendment have always adapted to the audience intended for the speech. Specifically, we have recognized certain speech, while fully protected when directed to adults, may be restricted when directed towards minors. *See, e.g., Sable Communications v. FCC,* 492 U.S. 115, 126 (1989); *Connection Distrib. Co. v. Reno,* 154 F.3d 281, 291-92 (6th Cir. 1998). We have also required, however, that such regulations be narrowly tailored to protecting minors from speech that may improperly influence them and not effect an "unnecessarily broad suppression of speech" appropriate for adults. *Reno v. American Civil Liberties Union,* 521 U.S. 844, 874-75 (1997); *United States v. Playboy Entm't Group, Inc.,* 529 U.S. 803, 812-13 (2000); *Connection Distrib.,* 154 F.3d at 292.

Of course, the measure here intended to protect minors from the improper influence of otherwise protected speech is quite different from the regulations that we have countenanced in the past. Those regulations were the product of the reasoned deliberation of democratically elected legislative bodies, or at least regulatory agencies exercising authority delegated by such bodies. It was legislative bodies that had demarcated what otherwise protected speech was inappropriate for children and that had outlined in advance the measures that speakers were required to take in order to protect children from the speech.

In contrast, the question before us is whether to permit tort liability for protected speech that was not sufficiently prevented from reaching minors. At trial, the plaintiff would undoubtedly argue about the efficient measures that the defendants should have taken to protect the children. But at the end of this process, it would be impossible for reviewing courts to evaluate whether the proposed protective measures would be narrowly tailored regulations. Who would know what omission the jury relied upon to find the defendants negligent? Moreover, under the concept of negligence, there is no room for evaluating the value of the speech itself. The question before a jury evaluating James's claim of negligence would ask whether the defendants took efficient precautions, in keeping their material from Carneal, that would be less expensive than the amount of the loss, the three deaths.

We cannot adequately exercise our responsibilities to evaluate regulations of protected speech, even those designed for the protection of children, that are imposed pursuant to a trial for tort liability. Crucial to the safeguard of strict scrutiny is that we have a clear limitation, articulated in the legislative statute or an administrative regulation, to evaluate. "Whither our children," as Appellant's brief states at 3, is an important question, but their guidance through the regulation of protected speech should be directed in the first instance to the legislative and executive branches of state and federal governments, not the courts.

Our concerns about adequately evaluating the narrow tailoring of regulations wane if the underlying expression is completely unprotected. Whether certain speech is not protected at all is a question that courts are regularly called upon to answer. James argues that to the extent that the content distributed by the defendants is at all expressive, it constitutes obscene material that is unprotected by the First Amendment. *See Paris Adult Theatre I v. Slaton,* 413 U.S. 49, 69 (1973). It would be novel to argue that the video games and *The Basketball Diaries* are obscene. As we understand James's complaint, he complains that the video games and the movie are excessively violent – yet we have generally applied our obscenity jurisprudence only to material of a sexual nature, appealing only to prurient interest and lacking any other socially redeeming value. *See Miller v. California,* 413 U.S. 15, 23-24 (1973) ("We now confine the scope of [obscene material] to works which depict or describe sexual conduct."); *United States v. Thorma,* 726 F.2d 1191, 1200 (7th Cir. 1984) (holding that because depictions of violence are not sexual, obscenity jurisprudence does not apply).

With the sexually-oriented internet defendants, James has an arguable basis to allege that the material is unprotected speech under our conventional obscenity jurisprudence. Nevertheless, where the First Amendment concerns wane the most with the possibility of obscenity, the foreseeability problems loom the largest. In his complaint, James contends that the sexual content displayed by the internet sites made "virtual sex pleasurable and attractive" for Carneal and caused him to undertake his violent actions. To us, however, James's allegations regarding his exposure to violence seem much closer to the mark. After all, James does not seek to hold the internet defendants responsible for a sexual crime: Carneal never endeavored sexually to abuse his victims, just to kill them.

With the movie and video game defendants, James contends that their material is excessively violent and constitutes obscene, non-protected speech. We decline to extend our obscenity jurisprudence to violent, instead of sexually explicit, material. Even if we were to consider such an expansion, James's arguments are not conceptually linked to our obscenity jurisprudence. The concept of obscenity was designed to permit the regulation of "offensive" material, that is, material that people find "disgusting" or "degrading." *See American Amusement Mach. Ass'n v. Kendrick,* 244 F.3d 572, 574 (7th Cir. 2001). James's argument, on the other hand, is that the violent content of these video games and the movie shapes behavior and causes its consumers to commit violent acts. This is a different claim than the obscenity doctrine, which is a limit on the extent to which the community's sensibilities can be shocked by speech, not a protection against the behavior that the speech creates. *Id.* at 574-75 (holding that the law of obscenity does not apply to the argument that violence in video games causes players to commit violent acts).

This is not to say that protecting people from the violence that speech might incite is a completely impermissible purpose for regulating speech. However, we have generally handled that endeavor under a different category of our First Amendment jurisprudence, excluding from constitutional protection those communicated ideas and images that incite others to violence. Speech that falls within this category of incitement is not entitled to First Amendment protection. *See R.A.V. v. City of St. Paul,* 505 U.S. 377, 384-85 (1992). The Court firmly set out the test for whether speech constitutes unprotected incitement to violence in *Brandenburg v. Ohio,* 395 U.S. 444 (1969). In protecting against the propensity of expression to cause violence, states may only regulate that speech which is "*directed to* inciting or producing *imminent* lawless action and *is likely to incite* or produce such action." *Id.* at 447 (emphasis added).

The violent material in the video games and *The Basketball Diaries* falls well short of this threshold. First, while the defendants in this case may not have exercised exquisite care regarding the persuasive power of the violent material that they disseminated, they certainly did not "intend" to produce violent actions by the consumers, as is required by the *Brandenburg* test. *Hess v. Indiana,* 414 U.S. 105, 108 (requiring evidence that the speaker "intended" his words to produce violent conduct under the *Brandenburg* test). Second, the threat of a person like Carneal reacting to the violent content of the defendants' media was not "imminent." Even the theory of causation in this case is that persistent exposure to the defendants' media gradually undermined Carneal's moral discomfort with violence to the point that he solved his social disputes with a gun. This glacial process of personality development is far from the temporal imminence that we have required to satisfy the *Brandenburg* test. *Ashcroft v. Free Speech Coalition,* 122 S.Ct. 1389, 1394 (2002) ("The mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it absent some showing of a direct connection between the speech and imminent illegal conduct."); *McCoy v. Stewart,* 282 F.3d 626, 631 (9th Cir. 2002) (holding that incitement is not imminent if it risks third-party violence at some "indefinite future time"). Third, it is a long leap from the proposition that Carneal's actions were foreseeable to the *Brandenburg* requirement that the violent content was "likely" to cause Carneal to behave this way.

James contends that the *Brandenburg* test for speech inciting violence does not apply to depictions of violence, but instead only to political discourse advocating imminent violence. James suggests that the suppression of expression that is not advocacy, but does tend to inspire violence in its viewers or consumers, is governed by a less stringent standard. Federal courts, however, have generally demanded that all expression, advocacy or not, meet the *Brandenburg* test before its regulation for its tendency to incite violence is permitted. *See Dworkin v. Hustler Magazine, Inc.,* 867 F.2d 1188, 1199-1200 (9th Cir. 1989) (applying the *Brandenburg* test to arguments that pornography causes viewers to engage in conduct that is violent and degrading to women); *Herceg v. Hustler Magazine, Inc.,* 814 F.2d 1017, 1024 (5th Cir. 1987) (rejecting suggestion "that a less stringent standard than the *Brandenburg* test be applied in cases involving non-political speech that has actually produced harm.").

Like the district court, we withhold resolution of these constitutional questions given the adequacy of the state law grounds for upholding the dismissal. Attaching such tort liability to the ideas and images conveyed by the video games, the movie, and the internet sites, however, raises grave constitutional concerns that provide yet an additional policy reason not to impose a duty of care between the defendants and the victims in this case.

B. Proximate Causation

Even if this court were to find that the defendants owed a duty to protect James, Steger, and Hadley from Carneal's violent actions, the plaintiffs likely have not alleged sufficient facts to establish the third element of a *prima facie* tort case: proximate causation. The defendants argue that even if they were negligent, Carneal's intentional, violent actions constitute a superseding cause of the plaintiffs' damages and sever the defendants liability for the deaths of Carneal's victims. Generally, a third party's criminal action that directly causes all of the damages will break the chain of causation.

Yet, Kentucky courts have held that an intervening third-party criminal act will not be a superseding cause breaking the chain of causation if the act was reasonably foreseeable. *See, e.g., Britton v. Wooten,* 817 S.W.2d 443, 449-50 (Ky. 1991). In *Britton,* the plaintiff had been injured by a fire in his leased store. The fire started when trash piled next to the building by the landlord was ignited by an arsonist. The court held that the arsonist's intervening act was not a superseding cause of the fire because the act was a reasonably foreseeable result of the landlord's piling of flammable material next to the building. *Ibid.*

The court reached the question of causation in *Britton* because of the landlord's well established duty of care to protect its tenants from injury. *See, e.g., Waldon v. Housing Auth. of Paducah,* 854 S.W.2d 777, 779 (Ky. Ct. App. 1991) (holding landlord liable for failing to protect tenant from being shot by a third-party intruder). As we have noted above, the duty of the media defendants in this case is far from as firmly established. Outside of the landlord-tenant context, Kentucky courts are far more likely to determine that an intervening criminal act is a superseding cause. *See Briscoe v. Amazing Prod., Inc.,* 23 S.W.3d 228, 229-30 (Ky. Ct. App. 2000). *Compare House v. Kellerman,* 519 S.W.2d 380 (Ky. Ct. App. 1975) (confronting the question of superseding cause in the context of the well established duty of driver to protect his passenger). In *Briscoe,* the plaintiff was injured by a third party who battered her by spraying corrosive drain cleaner in her face. The plaintiff contended that the manufacturer of the drain cleaner was negligent and should have anticipated that it could be used as a weapon. The court held that batteror's reaction to and use of drain cleaner as a weapon was sufficiently unforeseeable to constitute a superseding cause. *Briscoe,* 23 S.W.3d at 230.

A similar analysis is applicable here. Our determination regarding the idiosyncratic nature of Carneal's reaction to the defendants' media would likely compel us to hold that his action constitutes a superseding cause. We, however, need not reach this question because we have determined that the defendants did not owe a duty to protect the decedants.

IV

James also contends that the district court erred in dismissing his products liability claims. In his complaint, James alleged that the defendants' video games, movie, and internet transmissions constitute "products," and their violent content "product defects." Under Kentucky law, manufacturers, distributors, and retailers of "products" are strictly liable for damages caused by "defects" in those products. *Clark v. Hauck Mfg. Co.,* 910 S.W.2d 247, 250 (Ky. 1995); Restatement (Second) of Torts § 402A. If this theory of liability were to apply, James's failure to establish a duty to exercise ordinary care to prevent the victims' injuries (See Part III.A) would be irrelevant. Under strict liability, James would only be required to establish causation.[3]

James's theory of product liability in this case is deeply flawed. First, and something none of the parties have mentioned, the "consumers or ultimate users" of the alleged products are not the ones claiming physical harm in this case. Restatement (Second) of Torts § 402A. Carneal was the person who "consumed" or "used" the video games, movie, and internet sites. Allegedly because of Carneal's consumption of the products, he killed the victims in this case. In early products liability law, courts had required privity between the final retailer of the product and the injured plaintiff for strict liability to attach. Eventually, courts broadened the class of plaintiffs who could avail themselves of strict liability to include those who consumed or ultimately used the product. Kentucky courts, but certainly not all courts, have extended the protection of products liability to "bystanders" who are injured by the product, but are not "using" or "consuming" the product. *Embs v. Pepsi-Cola Bottling Co. of Lexington,* 528 S.W.2d 703 (Ky. Ct. App. 1975) (holding that bystander could recover on strict liability basis for injuries caused by exploding soda bottle); Restatement (Second) of Torts § 402A, n.1 (noting the split in authority regarding whether bystanders may recover on a strict liability basis). Imposing strict liability for the injuries suffered in this case would be an extension of Kentucky's bystander jurisprudence, as the decedents were not directly injured by the products themselves, but by Carneal's reaction to the products.

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[3] Of course, James would continue to encounter proximate causation problems. *See* Part III.B.

We place this open question of Kentucky law aside as the parties apparently have. James has failed to demonstrate a prior requirement, that the video games, movies, and internet sites are "products" for purposes of strict liability. This was the basis on which the district court dismissed James's products liability claims, holding that the video games, movie, and internet transmissions were not "products," at least in the sense that James sought to attach liability to them.

This court has already substantially resolved the question of Kentucky law presented. In *Watters v. TSR*, 904 F.2d 378 (6th Cir. 1990), this court held that "words and pictures" contained in a board game could not constitute "products" for purposes of maintaining a strict liability action. We cannot find any intervening Kentucky authority that persuades us that *Watters* no longer correctly states Kentucky law. James's theory of liability, that the ideas conveyed by the video games, movie cassettes and internet transmissions, caused Carneal to kill his victims, attempts to attach product liability in a nearly identical way.

James argues that, at least in this case, we are not just dealing with "words and pictures." Carneal, of course, had video game cartridges and movie cassettes. James argues that the test for determining whether an item is a product for purposes of Kentucky law is whether it is "tangible," and that the cartridges and cassettes are "tangible." As for the internet sites, James points us to a court that has held that "electricity" is a "product" for purposes of strict liability under Kentucky law. *See C.G. Bryant v. Tri-County Elec. Membership Corp.*, 844 F. Supp. 347, 352 (W.D. Ky. 1994). Internet sites are nothing more than communicative electrical pulses, James contends. James argues that there is no relevant difference between the internet transmissions and the electricity.

And of course James is partially correct. Certainly if a video cassette exploded and injured its user, we would hold it a "product" and its producer strictly liable for the user's physical damages. In this case, however, James is arguing that the words and images purveyed on the tangible cassettes, cartridges, and perhaps even the electrical pulses through the internet, caused Carneal to snap and to effect the deaths of the victims. When dealing with ideas and images, courts have been willing to separate the sense in which the tangible containers of those ideas are products from their communicative element for purposes of strict liability. *See, e.g., Winter v. G.P. Putnam's Sons,* 938 F.2d 1033, 1036 (9th Cir. 1991); *Jones v. J.B. Lippincott Co.,* 694 F. Supp. 1216, 1217-18 (D. Md. 1988). We find these decisions well reasoned. The video game cartridges, movie cassette, and internet transmissions are not sufficiently "tangible" to constitute products in the sense of their communicative content.

V

For all the foregoing reasons, we AFFIRM the district court's dismissal of all James's claims.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION

Joe James and Judy James, Co-Administrators of the Estate of Jessica James AND Thomas Wayne Steger and Sabrina Collins Steger, Co-Administrators of the Estate of Kayce Steger AND Gwen Hadley, Administratrix of the Estate of Nicole Marie Hadley,

Plaintiffs

Civil Action Number.: 5:99CV-96-J

v.

Meow Media, Inc., d/b/a WWW.persiankitty.com, Network Authentication Systems, Inc., d/b/a www.adultkey.com, www.porntech.com, Midway Home Entertainment, Apogee Software, Ltd., ID Software, Inc., Acclaim Entertainment, Inc., GT Interactive Software Corp., Interplay Productions Inc., Nintendo of America, Sega of America, Inc., Virgin Interactive Media, Activision, Inc., Capcom Entertainment, Inc., Sony Computer Entertainment d/b/a Sony Interactive Studios America, Lasersoft, Inc., Williams Entertainment, Inc., Time Warner, Inc., Polygram Film Entertainment Distribution, Inc., Island Pictures, Palm Pictures and New Line Cinema,

Defendants.

MEMORANDUM OPINION

This matter is before the Court for ruling on Defendants' Motions to Dismiss [dkt.#10, 47, 48, 49, 50, 52, & 53]. The Motions have been fully briefed and are now ripe for review. For the reasons set forth herein, the Motions to Dismiss will be granted and this case will be dismissed as to all Defendants.

Background Facts and the Complaint

Plaintiffs brought this action alleging negligence, strict liability, and RICO violations against various groups of Defendants based on the underlying theory that the Defendants' actions or lack thereof in creating and distributing a movie, numerous video games, and various internet materials caused their daughters' deaths and subsequent loss of earning capacity. As common to all counts, the following facts are set forth in the complaint:

> On the morning of December 1, 1997, Michael Carneal, then fourteen years of age, took six guns, including a pistol, to the Heath High School in McCracken County, Kentucky. Carneal waited for a daily voluntary student prayer session to end. He then shot Jessica James, Kayce Steger, and Nicole Hadley, all three of whom were members of the prayer group, to death. He wounded five others . . . . In the aftermath of the massacre the police seized Michael Carneal's computer. Carneal was an avid computer user who logged onto the Internet to consume material that was obscene, obscene for minors, pornographic, sexually violent, and/or violent in content. Law enforcement officials also learned that Carneal was a consumer of violent computer and video games . . . [and] that Carneal was a

> consumer of movies containing obscenity, obscenity for minors, pornography, sexual violence, and/or violence. One such movie that Carneal consumed was *The Basketball Diaries.* In this movie a student . . . graphically massacres his classmates with a shotgun. . . . Dr. Diane Schetky . . . an adolescent psychiatrist . . . concluded that Carneal was profoundly influenced by his exposure to the above violent/pornographic media and that: '[t]he media's depiction of violence as a means of resolving conflict and a national culture which tends to glorify violence further condones his thinking.' Michael Carneal was found guilty of second-degree murder and sentenced to twenty-five years in jail without possibility of parole.

Based on the foregoing, Plaintiffs, the parents of the deceased children, filed the instant complaint against three distinct groups of Defendants.

The Basketball Diaries Defendants

In count one of the complaint, Plaintiffs sue the makers and distributors of a movie titled *The Basketball Diaries.*[1] Plaintiffs describe the movie as being "a nihilistic glamorization of irresponsible sex, senseless and gratuitous violence, hatred of religion, disregard of authority, castigation of the family, drug use, and other self-destructive behaviors." According to Plaintiffs, the *Diaries* Defendants "fabricated a gratuitous and graphic murder spree for the sole purpose of hyping the movie and increasing its appeal to young audiences. This had the effect of harmfully influencing impressionable minors such as Michael Carneal and causing the shootings."

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[1] **Plaintiffs name Time Warner, Palm Pictures, Island Pictures, New Line Cinema, and Polygram as Defendants in the complaint [hereinafter referred to as the *Diaries* Defendants].**

The Video Games Defendants

In count two of the complaint, Plaintiffs sue the creators and distributors of various video games,[2] alleging that the Video Games Defendants "manufactured and/or supplied to Michael Carneal violent video games which made the violence pleasurable and attractive, and disconnected the violence from the natural consequences thereof, thereby causing Michael Carneal to act out the violence . . . [and] trained Carneal how to point and shoot a gun in a fashion making him an extraordinarily effective killer without teaching him any of the constraints or responsibilities needed to inhibit such a killing capacity."

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[2] Plaintiffs name Midway Home Entertainment, Apogee Software, Inc., ID Software, Inc., Virtus Corporation, Acclaim Entertainment, Inc., Atari Corporation, GT Interactive Software Corporation, Interplay Productions, Inc., Nintendo of America, Sega of America, Inc., Virgin Interactive Media, Activision, Inc., Capcom Entertainment, Inc., EIDOS Interactive, Williams Entertainment, Inc., Square Soft, Inc. d/b/a Square USA Inc. and Sony Computer Entertainment d/b/a Sony Interactive Studios America as Defendants in the complaint [hereinafter referred to as the Video Game Defendants]. Plaintiffs later voluntarily dismissed Defendants Virtus Corporation, EIDOS Interactive, Square Soft, and Atari Corporation. [See dkt.#34, 41, 44 & 45].

The Internet Defendants

In count three of the complaint, Plaintiffs sue various owners of internet websites.[3] According to Plaintiffs, the Internet Defendants "distributed to Michael Carneal, a minor, by means of the Internet, certain pornographic and obscene material. This material influenced Carneal in such a fashion that it was a legal cause of the injuries to Plaintiffs' decedents. Such material, among other effects, served to further attenuate actions from consequences in Carneal's mind, made virtual sex pleasurable and attractive, provoked violence in Carneal, and disconnected the violence from the natural consequences thereof, thereby causing Michael Carneal to act out the violence."

In addition, Plaintiffs allege in count four that the Internet Defendants "engaged in a pattern of racketeering activity by distributing certain obscene matter by means of the Internet through interstate commerce to Michael Carneal, a minor in violation of state and federal obscenity and obscenity to minor statutes."

Allegations Common To All Defendants

After making the foregoing specific allegations as to each group of Defendants, Plaintiffs bring some twenty-three claims sounding in negligence and strict products liability in counts one through three common to all Defendants. Among these various claims are the allegations:

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[3] Plaintiffs name Meow Media, Inc. d/b/a *www.persiankitty.com* and Network Authentication Systems, Inc. d/b/a *www.adultkey.com* and *www.porntech.com* as Defendants in the complaint [hereinafter referred to as the Internet Defendants].

that the Defendants knew or should have known that copycat violence would result from the use of their products and materials; that Defendants knew or should have known that their products and materials created an unreasonable risk of harm because minors would be influenced by the effect of their products and materials and then would cause harm; that Defendants knew or should have known that their products and materials were in an unreasonably defective condition and likely to be dangerous for the use for which they were supplied; and that Defendants failed to exercise reasonable care to inform consumers of the dangerous condition of their products and materials or of the facts which made their products and materials likely to be dangerous.

The Motions to Dismiss and the Failure to State a Claim Standard

Defendants filed various motions to dismiss these claims pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure arguing that Plaintiffs' allegations fail to state a claim upon which relief can be granted. When evaluating a 12(b)(6) motion to dismiss, the Court liberally construes a plaintiff's claim and will grant the motion to dismiss only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Windsor v. The Tennessean,* 719 F.2d 155, 158 (6th Cir.1983) (*citing Conley v. Gibson,* 355 U.S. 41 (1957)). In reviewing a plaintiff's claim, Rule 12(b)(6) requires the court to accept all factual allegations as true because the purpose of the motion "is to allow a defendant to test whether, as a matter of law, the plaintiff is entitled to legal relief even if everything alleged in the complaint is true." *Mayer v. Mylod,* 988 F.2d 635, 638 (6th

Cir.1993). However, "[o]nly well-pleaded facts . . . must be taken as true. The trial court need not accept as true legal conclusions or unwarranted factual inferences." *Lewis v. ACB Business Serv., Inc.,* 135 F.3d 389 (6th Cir.1998) (citations omitted).

Therefore, as the purpose of the motion to dismiss is to challenge the legal theory of the complaint, the Court begins its analysis by examining each cause of action separately to determine whether, as a matter of law, Plaintiffs have stated a claim upon which relief can be granted.

Plaintiffs' Causes of Action for Negligence

Plaintiffs allege various negligence claims against all Defendants. To bring these causes of action pursuant to Kentucky law, Plaintiffs must establish the three fundamental elements common to all negligence claims: "a duty, a violation thereof, and consequent injury. The absence of any one of the[se] three elements is fatal to the claim." *M & T Chemicals, Inc. v. Westrick,* 525 S.W.2d 740, 741 (Ky. 1974).

1). *Did the Defendants Owe a Duty of Care?*

Kentucky law dictates that "[e]very person owes a duty to every other person to exercise ordinary care in his activities to prevent any foreseeable injury from occurring to such other person." *Id.* Plaintiffs allege that Defendants breached the legal duty of ordinary care owed to them by: 1) designing, manufacturing, and distributing products and materials they knew or should have known were likely to affect minors in such a way as to result in harm to others; and 2) failing to warn the public of the unreasonably dangerous condition and characteristics of their products and materials. However, "[p]rior to application of the universal duty of care to a particular set of facts, it must appear that the harm was foreseeable and the facts must be viewed as they reasonably appeared to the party charged with negligence, not as they appear based on hindsight." *North Hardin Developers, Inc. v. Corkran,* 839 S.W.2d 258, 261 (Ky. 1992). Therefore, before Defendants can be charged with owing a duty of care, the Court must first determine whether the injuries in question were foreseeable.

Plaintiffs argue that "whether the murders . . . were foreseeable is an issue of fact that must be decided by the jury . . . . If the Defendants 'knew or should have known' of the potential for harm to a plaintiff by an actor then liability attaches . . . . Plaintiffs have pled as much against all defendants; those allegations must be taken as true." [dkt.#68, p. 10]. Essentially, Plaintiffs argue that because they alleged foreseeability in their complaint, and because Rule 12(b)(6) dictates that a court must accept factual allegations as true for purposes of a motion to dismiss, they have established that a duty was owed. However, this court is "required to accept only well-pleaded facts as true, not the legal conclusions that may be alleged or that may be drawn from the pleaded facts." *Blackburn v. Fisk University,* 443 F.2d 121, 124 (6th Cir.1971). Under Kentucky law, whether a defendant owed a duty is a matter of law for the Court to determine. *See Mullins v. Commonwealth Life Ins. Co.,* 839 S.W.2d 245, 248 (Ky. 1992).

Kentucky courts have stated that "whether or not a duty exists is but a conclusion of whether a plaintiff's interests are entitled to legal protection against the defendant's conduct. The existence of a duty is an issue of law, and a court, when making the determination of such existence, engages in what is essentially a policy determination." *Sheehan v. United Services Automobile Assoc.*, 913 S.W.2d 4, 6 (Ky.Ct.App. 1996) (*citing Mullins,* 839 S.W.2d at 330). Part of the determination as to "whether a plaintiff's interests are entitled to legal protection against the defendant's conduct" and therefore a duty owed, depends on whether the plaintiff's injuries were foreseeable to the defendant. For support of their proposition that foreseeability is a question of fact which must be decided by a jury, Plaintiffs cite as authority *Schrand v. Grant,* 1999 WL 540877 (Ky.Ct.App.) (a non-final opinion that is not to be cited as authority); *Watts v. K.S. & H.*, 957 S.W.2d 233, 239 (Ky. 1997); *Finney Company Inc. v. Monarch Const. Co.*, 670 S.W.2d 857, 863 (Ky. 1984) (dissenting opinion); and *Workman v. Columbia Natural Resources,* 864 F.Supp. 638 (E.D.Ky. 1994). Contrary to Plaintiffs' analysis, the common rationale found in these opinions is that the issue of foreseeability is submitted to the jury only in cases where there might be a reasonable difference of opinion as to whether the injuries were foreseeable. "[W]here the court would conclude as a matter of law that it was clearly unreasonable to foresee the potential harm from the misconduct involved," the question is not one for a jury. *See Grayson Fraternal Order of Eagles v. Claywell,* 736 S.W.2d 328, 334 (Ky. 1987).

At this juncture, the Court must decide as a matter of law whether the facts, as alleged in the complaint and accepted as true for the purposes of the motion to dismiss, present a situation where there might be a reasonable difference of opinion in regards to the foreseeability of

Plaintiffs' injuries. Simply put, would reasonable people conclude that it was foreseeable to Defendants that as a result of disseminating their products and failing to warn of the materials contained therein, a fourteen-year-old boy who played their video games, watched their violent movie, and viewed their provocative website materials would go to a friend's house, steal guns, take the guns to school the next day, and gun down his classmates during a prayer session?

Under the facts alleged in the complaint, which are accepted as true for purposes of these motions, the Court concludes as a matter of law that it was clearly unreasonable to expect Defendants to have foreseen Plaintiffs' injuries from Michael Carneal's actions. Because the injuries were unforeseeable, Defendants did not owe a duty of care upon which liability can be imposed.

In arriving at this decision, the Court relies on and is bound by the Sixth Circuit's rationale in *Watters v. TSR, Inc.*, 904 F.2d 378 (6th Cir.1990). There, the mother of a boy who committed suicide filed negligence and strict liability claims against the manufacturers of a game called Dungeons & Dragons. *See id.* She alleged that as a result of her son Johnny's exposure to the game, he lost control and committed suicide. *See id.* at 380. As in this case, the decedent's mother alleged that the defendant had violated a duty of care in disseminating the game and by failing to warn of the "possible consequences" of playing the game. *See id.* at 381. Similarly, the defendant argued that it did not owe a duty of care because Johnny Burnett's suicide was unforeseeable. *See id.* Although the claims were premised on state law, this Court decided the matter on constitutional grounds reasoning that the First Amendment barred the imposition of liability. *See id.* On appeal, the Sixth Circuit affirmed the outcome of the case but reasoned that the matter should have been decided on state law grounds. *See Watters,* 904 F.2d at 381. In resolving the matter pursuant to Kentucky law, the Sixth Circuit reasoned that, "[t]o submit this case to a jury on either theory, it seems to us, would be to stretch the concepts of foreseeability and ordinary care to lengths that would deprive them of all normal meaning." *Id.*

Here, as in *Watters,* it would also "stretch the concepts of foreseeability" to submit this case to a jury. Reasonable people would not conclude that it was foreseeable to Defendants that Michael Carneal, a boy who played their games, watched their movie, and viewed their website materials, would murder his classmates. Even accepting the pleaded facts as true, that Michael Carneal was an avid consumer of violent video games, nihilistic movies, and obscene internet materials and was influenced by all of these events, does not make the murders foreseeable to the Defendants. Just as Johnny Burnett's suicide in *Watters* was unforeseeable to the distributors of the game, Dungeons and Dragons, so was Michael Carneal's killing spree unforeseeable to the Video Games, *Basketball Diaries,* and Internet Defendants. The fact that Michael Carneal chose to kill his classmates rather than himself does not make his actions any more foreseeable. As the Sixth Circuit reasoned in *Watters*:

> The defendant cannot be faulted, obviously, for putting its game on the market without attempting to ascertain the mental condition of each and every prospective player. The only practicable way of insuring that the game could never reach a 'mentally fragile' individual would be to refrain from selling it at all – and we are confident that the courts of Kentucky would never permit a jury

> to say that simply by marketing a parlor game, the defendant violated its duty to exercise ordinary care . . . . Were the courts of Kentucky prepared to say that works of the imagination can be linked to a foreseeable danger of anti-social behavior, thereby giving rise to a duty to warn, one would expect to find Kentucky caselaw to that effect in lawsuits involving television networks, book publishers, or the like. There is no such caselaw.

Id. at 382. The facts in this case also present a situation where the manufacturers and distributors would likewise be charged with attempting to ascertain the mental condition of consumers before marketing their materials.

Plaintiffs argue that "[t]his case is factually unrelated to *Watters*" and suggest that "[s]urely the Sixth Circuit Court of Appeals and the Kentucky courts would find the smut in this action utterly unlike the creative "learning tool" in *Watters*." [dkt.#68, p. 14-15]. Instead, Plaintiffs state their claims are "akin" to those found in *Byers v. Edmondson,* 712 So.2d 681 (La.App. 1st Cir.1998), *cert. denied,* ___ U.S. ___, 119 S.Ct. 1143 (1999). In *Byers,* a shooting victim brought negligence and intentional tort claims against the directors, producers, and distributors of the movie, "*Natural Born Killers.*" *See id.* at 684. The victim, who was rendered paraplegic by the shooting, alleged that the shooter "went upon a crime spree . . . as a result of seeing and becoming inspired by the movie." *Id.* The movie defendants moved to dismissed the claims on the basis that they did not owe a duty to the plaintiff. *See id.* The trial court dismissed the action, but on appeal the Louisiana Court of Appeals reversed the dismissal of the entire action and remanded the matter for further proceedings. *See id.*

Plaintiffs argue that the holding in *Byers* supports their position because the Louisiana Court of Appeals "found that a cause of action premised in negligence had properly been asserted by the shooting victim." [dkt.#68, p. 16]. An examination of the *Byers* opinion reveals just the contrary. The appellate court did not find that a negligence action had been properly asserted. Rather, it affirmed the trial court's dismissal of the negligence claims holding that "a defendant does not owe a duty to protect a person from the criminal acts of third parties absent a special relationship which obligates the defendant to protect the plaintiff from such harm." *Id.* at 667. And, while the appellate court reversed the trial court's dismissal of the intentional tort claims, it did so only on the grounds that the plaintiff had alleged enough facts to establish a cause of action for an intentional tort claim. *See Byers,* 712 So.2d at 687, 689. Here, Plaintiffs do not bring their claims pursuant to intentional tort theories but instead base their claims on theories of "negligence, product liability and violation of the Racketeer Influenced and Corrupt Organizations Act." [dkt.#68, p. 6; see also dkt.#1]. Plaintiffs' reliance on *Byers* is wholly misplaced because that court refused to impose a duty on the movie defendants and affirmed the dismissal of the negligence claims.

Other courts across the country have also refused to impose a duty on defendants in like situations. For example, in *McCollum v. Columbia Broadcasting Systems, Incorporated,* the plaintiffs filed suit alleging that Ozzy Osbourne's song, "Suicide Solution" caused a child to commit suicide. *See* 202 Cal.App.3d 989 (2nd Dist. 1988). In dismissing the action, the California court reasoned:

> [I]t is simply not acceptable to a free and democratic society to impose a duty upon performing

> artists to limit and restrict their creativity in order to avoid the dissemination of ideas in artistic speech which may adversely affect emotionally troubled individuals. Such a burden would quickly have the effect of reducing and limiting artistic expression to only the broadest standard of taste and acceptance and the lowest level of offense, provocation and controversy. No case has ever gone so far. We find no basis in law or public policy in doing so here.

Id. at 1005-06. Another example is *Zamora v. CBS* where a plaintiff filed suit alleging that his exposure to television violence caused him to become "desensitized to violent behavior," to develop a "sociopathic personality," and to kill his eighty-three-year-old neighbor. *See* 480 F.Supp. 199 (S.D.Fla. 1979). The Florida court dismissed the complaint on the basis that the defendants did not owe a duty and reasoned that:

> [T]he plaintiffs seek the imposition of a duty (a standard of care) which has no valid basis and would be against public policy. A recognition of the 'cause' claimed by the plaintiffs would provide no recognizable standard for the television industry to follow. The impositions pregnant in such a standard are awesome to consider. Here the three major networks are charged with anticipating the minor's alleged voracious intake of violence on a voluntary basis; his parents' apparent acquiescence in this course, presumably without recognition of any problem and finally that young Zamora would respond with a criminal act of the type in question. Again, wholly apart from additional procedural problems which should be noted, the question is appropriate; how and why should the Court create such a wide expansion in the law of torts in Florida? (passing

> for the moment the important considerations presented by the First Amendment). The clear answer is that such expansion is not warranted. *Indeed, this Court lacks the legal and institutional capacity to identify isolated depictions of violence, let alone the ability to set the standard for media dissemination of items containing 'violence' in one form or the other.*

Id. at 202 (emphasis added); *see also Davidson v. Time Warner, Inc.,* 1997 WL 405907 (S.D.Tex. 1997) (holding that it was unforseeable to producers of rap music that by distributing 2Pacalypse Now, which contained a song about "cop killings," a person would kill a police officer); *Sakon v. Pepsico., Inc.,* 553 So.2d 163, 166 (Fla. 1989) (holding that it was unforeseeable that a child would imitate a stunt in a commercial).

Careful consideration of the Sixth Circuit's analysis in *Watters* and the rationales found in case law from other jurisdictions lead this Court to believe that Kentucky courts would not impose a duty of care on the Defendants. Nothing Defendants did or failed to do could have been reasonably foreseen as a cause of injury. In addition to the foreseeability factor, this Court also finds another basis for holding that Defendants did not owe a duty of care. In *Watters,* the Sixth Circuit articulated a significant observation in regards to the imposition of a duty of care in cases such as this. *See* 904 F.2d at 383. Explicitly, it stated:

> A Kentucky court considering the application of Kentucky's common law in this situation would obviously be aware of the constitutional problems looming in the background – and if possible, we believe, such a court would avoid applying the common law in a way that would bring the constitutional problems to the fore. The

> constitutional problems would be avoided, of course, by holding that the plaintiff failed to show a justiciable issue as to any breach of a recognized legal duty – and that is where we think Kentucky courts would come out.

Id. This Court adopts this observation as a further reason for rejecting Plaintiffs' argument that a legal duty should be imposed. Because Defendants owed no duty to Plaintiffs as a matter of law, the negligence claims must be dismissed.

So that Plaintiffs will fully understand the problems in bringing their negligence claims, the Court will proceed to address a second barrier – the superseding cause doctrine.

2). *The Superseding Cause Doctrine*

The Sixth Circuit has stated that "there can be no liability for negligence if the negligence is not shown to have 'caused' the injury complained of." *Watters,* 904 F.2d at 383. In Kentucky, the chain of causation may be broken by "facts [that] are legally sufficient to constitute an intervening [superseding] cause." *Montgomery Elevator Co. v. McCullough,* 676 S.W.2d 776, 780 (Ky. 1984). If an intervening act is not a "normal response" to the original tortious act, it is an "extraordinary" act which breaks the chain of causation. *See* RESTATEMENT SECOND OF TORTS § 444. Ultimately, if the act consists of facts "of such 'extraordinary rather than normal' or 'highly extraordinary' nature, unforeseeable in character, [it will] relieve the original wrongdoer of liability to the ultimate victim.'" *Montgomery Elevator,* 676 S.W.2d at 780 (*quoting House v. Kellerman,* 519 S.W.2d 380, 382 (Ky. 1974)).

Plaintiffs argue that whether Michael Carneal's actions were a superseding cause is a question of fact that must be decided by a jury. Contrary to Plaintiffs' argument, the Kentucky Supreme Court has held that "[t]he question of whether an undisputed act or circumstance was or was not a superseding cause is a legal issue for the court to resolve, and not a factual question for the jury." *House v. Kellerman,* 519 S.W.2d 380, 382 (Ky. 1974). Whether an intervening act is a superseding cause becomes a factual question for the jury only when the actual occurrence of the intervening act is in dispute. *See id.* at 383. Here, Plaintiffs admit in their complaint that Michael Carneal's conduct was an intervening act and it is undisputed that Plaintiffs' daughters died at the hands of Michael Carneal. Therefore, whether Michael Carneal's intervening acts were a "superseding cause" is a legal issue for this Court to resolve.

The Sixth Circuit's opinion in *Watters* demonstrates the operation of the superseding cause doctrine in Kentucky. *See* 904 F.2d at 383-84. When holding that Johnny Burnett's suicide was an intervening, superseding cause which relieved the manufacturers of the game Dungeons & Dragons of liability, the Sixth Circuit stated that "[c]ourts have long been rather reluctant to recognize suicide as a proximate consequence of a defendant's wrongful act . . . We cannot tell why [Johnny committed suicide]. His death surely was not the fault of his mother, or his school, or his friends, or the manufacturer of the game he and his friends so loved to play. Tragedies such as this simply defy rational explanation, and courts should not pretend otherwise." *Id.*

Plaintiffs argue that "[u]nlike *Watters,* the issue before this Court is whether the criminal act of homicide by a child supersedes an original actor's liability. *Watters* is a fact specific decision limited to suicides." [dkt.#68, p. 19-20]. Instead, Plaintiffs "direct the court's attention to *Waldon v. Housing Authority of Paducah,* 854 S.W.2d 777 (Ky.Ct.App. 1993), a Kentucky decision that considers whether an intervening criminal homicide supersedes the original negligent actor's liability." [dkt.#68, p. 20]. In *Waldon,* a tenant in a public housing project was shot and killed outside her apartment. *See id.* at 778. The Housing Authority was sued on the grounds that its negligence caused the victim's death because it knew that threats had been made against the victim but did nothing to prevent the shooting. *See id.* The Housing Authority moved for summary judgment and argued that the intervening criminal act superseded its liability. *See id.* The trial court granted summary judgment, but on appeal, the appellate court rejected the argument and held that "[e]ven an intervening criminal act does not relieve one for [sic] liability for his or her negligent acts or omissions, where the criminal act is a reasonably foreseeable consequence of the defendant's negligent act." *Id.* at 779. Thus, according to Plaintiffs, "[i]f Carneal's criminal acts were a reasonably foreseeable consequence of Defendants' negligent production and distribution of violent, pornographic products, the proximate cause of the Plaintiffs' daughters' murders is '[c]learly a jury question.'" [dkt.#68, p. 22].

Plaintiffs argue that the holding of *Waldon* is "dispositive in this action." The Court does not agree. Actually, the appellate court reversed summary judgment in *Waldon* because there were issues of fact as to whether the Housing Authority should have realized that its acts or omissions involved an unreasonable risk of harm to the tenant: 1) the Housing Authority knew that the shooter, a man named Williams, had repeatedly threatened to kill the victim; 2) the Housing Authority knew that Williams was staying in the apartment complex with his relatives without permission; 3) the Housing Authority took no action to evict Williams or discourage his presence in the area; and 4) there were no security guards to patrol the complex even though crimes frequently occurred there. *See id.* Because of the existence of these factors, the appellate court concluded that there was a jury question on the issue of proximate cause due to the foreseeability of criminal conduct. *See id.* The appellate court reasoned that since the intervening criminal act was foreseeable to the Housing Authority, the shooting could not be deemed a superseding cause which would relieve the Housing Authority of liability. Contrary to Plaintiffs' argument, the *Waldon* analysis is inapposite to this case because here, Michael Carneal's intervening criminal acts were not foreseeable to the Defendants.

To help courts make the superseding cause determination, the Kentucky Court of Appeals reviewed existing case law on the subject and articulated that a superseding cause possesses the following attributes:

> 1) an act or event that intervenes between the original act and the injury; 2) the intervening act or event must be of independent origin, unassociated with the original act; 3) the intervening act or event must, itself, be capable of bringing about the injury; 4) the intervening act or event must not have been reasonably foreseeable by the original actor; 5) the intervening act or event involves the unforeseen negligence of a third party [one other than the first party actor or the second party plaintiff] or the intervention of a natural force; 6) the original act must, in itself,

> be a substantial factor in causing the injury, not a remote cause. The original act must not merely create a negligent condition or occasion; the distinction between a legal cause and a mere condition being foreseeability of injury.

NKC Hospitals, Inc. v. Anthony, 849 S.W.2d 564 (Ky.Ct.App. 1993). Assuming Plaintiffs established that the original act of negligently designing, manufacturing, and distributing was a substantial factor in causing Plaintiffs' injuries, the superseding cause doctrine would arise and break the chain of causation: 1) Michael Carneal's shooting spree intervened between the original act of negligently disseminating the materials and the decedents' deaths; 2) the shooting spree was of independent origin; 3) the shooting spree was capable of bringing about the deaths; 4) Michael Carneal's shooting spree was not reasonably foreseeable to Defendants; and 5) the shooting spree involved the unforeseen conduct of a third party, Michael Carneal.

The acts of Michael Carneal in murdering his classmates were so "highly extraordinary in nature" and "unforeseeable in character," that they operate to "relieve [Defendants] of liability to [Plaintiffs]." *See Montgomery Elevator,* 676 S.W.2d at 780. Just as Johnny Burnett's suicide was not a "normal response" to TSR disseminating the game Dungeons and Dragons in the *Watters* case, neither was Michael Carneal's shooting spree a "normal response" to Defendants disseminating their movie, games and website materials in this case. Pursuant to the superseding cause doctrine, the Defendants in this matter can be no more liable for the decedents' unforeseeable deaths than was the Dungeons & Dragons manufacturer liable for Johnny Burnett's unforeseeable suicide in *Watters.*

Plaintiffs argue that "[i]f this Court elects to entertain Defendants' assertion of the superseding cause defense, . . . the argument must still be denied because it has been abrogated by the pure comparative fault doctrine adopted by the Kentucky Supreme Court." [dkt.#68, p. 23]. Plaintiffs state that, "[w]hen an original actor's negligence and an intervening actor's negligence both play a role in causing the Plaintiffs' injuries, 'the comparative fault doctrine demands that fault and thus damages be apportioned among the tortfeasors.'" [dkt.#68, p. 25]. Thus, according to Plaintiffs, "a common law doctrine like superseding cause that forgives the liability of a negligent actor is 'manifestly contradictory' to the purposes of the comparative negligence system." [*see id.*]. Contrary to Plaintiffs' argument, the United States Supreme Court has held that the superseding cause doctrine is not inconsistent with the comparative fault doctrine. *See Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 837-38 (1986). Under the superseding cause doctrine, the intervening actor becomes solely responsible for injuries whereas under the comparative fault doctrine, fault is apportioned among all tortfeasors. In essence, the superseding cause eliminates the original actor's negligence as a cause of the injuries and absolves him of liability. The district court in *Carlotta v. Warner* aptly explained, "[t]he doctrine of comparative negligence does not mean that plaintiff is entitled to a recovery in some amount in every situation in which he can show some negligence of the defendant, however slight. If the plaintiff fails to establish that defendant's negligent act or omission was a substantial factor in causing harm to the plaintiff, or if there was a superseding cause, defendant will not be liable in any amount." 601 F.Supp. 749, 751 (E.D.Ky. 1985).

Despite Plaintiffs' arguments to the contrary, the superseding cause doctrine is applicable in this matter. Michael Carneal's actions constitute an unforeseeable intervening act which possess [sic] all the attributes of a superseding cause as set forth by the Kentucky Court of Appeals in *NKC Hospitals*. In addition, his actions comply with the Restatement Second of Torts' approach to the superseding cause doctrine, which has been adopted in Kentucky: the actions were "highly extraordinary" in nature; "unforeseeable in character;" and were not a "normal response" to the original tortious act. Therefore, as a matter of law, Michael Carneal's actions were a superseding cause which broke the chain of causation and absolved the Defendants of liability. Alternatively, Plaintiffs' negligence claims would be dismissed for this reason.

Plaintiffs' Cause of Action for Strict Liability

Plaintiffs allege claims for strict liability due to the alleged inherent dangerousness of the products in question. Pursuant to the Restatement Second of Torts § 402A, "[o]ne who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property." Claims brought under this theory shift the focus "from the conduct of the actor, which is the problem in negligence cases, to the condition of the product." *Montgomery Elevator Co. v. McCullough,* 676 S.W.2d 776 (Ky. 1984). Plaintiffs claim the games, movie, and internet materials were made and distributed "in a defective and unreasonably dangerous condition" because of their content and lack of warnings.

Kentucky courts have stated that the underlying purpose of the strict liability doctrine is to allow an injured party to reach back to the manufacturer or distributor of a product following some form of failure on the product's part. *Worldwide Equipment, Inc. v. Mullins,* 11 S.W.3d 50 (Ky.Ct.App. 1999). Thus, the very essence of the strict liability doctrine is that the use of a product caused an injury. Here, however, the actual use of the products in question, *i.e.,* video games, a movie, and website materials did not cause any injury. No one was injured *while* Michael Carneal was actually playing the video games or watching *The Basketball Diaries* movie or while he was viewing website materials. Rather, Plaintiffs contend that their daughters' deaths were caused by the way Michael Carneal interpreted and reacted to the subliminal messages contained in the products. Therefore, it is not the tangible physical characteristics of the products that Plaintiffs claim make the products defective, but instead the intangible thoughts, ideas and messages contained within the products. And, it is these subliminal messages about which Plaintiffs claim Defendants had a duty to warn the public.

The common theme in Defendants' Motions to Dismiss these claims is that thoughts, ideas, and expressive content are not products. Although Kentucky has adopted the theory of strict liability presented in the Restatement Second of Torts and has enacted the Kentucky Products Liability Act, neither the Restatement Second nor Kentucky's Product Liability Act provides a definition for "product." *See Dealers Transport Co. v. Battery Dist. Co.,* 402 S.W.2d 441 (Ky. 1966); K.R.S. § 411.300. As an initial matter, the Court must determine as a matter of law whether thoughts, ideas, and messages contained in a movie, video game, or website material constitute a "product" for purposes of strict products liability. *See e.g., Bryant v. Tri-County Elec. Membership Corp.*, 844 F.Supp. 347, 353 (W.D.Ky. 1994) (stating that the determination of a "product" is a question of law).

1). *Are Thoughts, Ideas, and Subliminal Messages "Products" Within the Ambit of the Strict Liability Doctrine?*

Plaintiffs argue that "intangibles" are products and "subject to strict liability [when] the 'intangibles' are sold to and consumed by the public." [dkt.#68, p. 29]. In support of their argument, Plaintiffs cite *Comshare Incorporated v. United States,* 27 F.3d 1142 (6th Cir.1994). There, a computer software company sued the government to obtain an income tax refund because the company had spent millions of dollars purchasing computer program source codes but had not been given the "tangible property" investment tax credit. *See id.* The Sixth Circuit held that Comshare was entitled to the "tangible property" tax credit because "the intangible information on Comshare's master source code tapes and discs could not exist in usable form without the tangible medium." *Id.* at 1149.

In addition, Plaintiffs cite a commercial transactions case, *Advent Systems Limited v. Unisys Corporation,* 925 F.2d 670 (3d Cir.1991). In *Advent Systems,* the Third Circuit held that once a computer program is downloaded onto a diskette, it becomes a "good" under the Uniform Commercial Code. *See* 925 F.2d at 675. Contrary to Plaintiffs' analysis, these holdings are inapposite because they do not discuss strict liability theories and are unrelated to products liability law. While computer source codes and programs are construed as "tangible property" for tax purposes and as "goods" for UCC purposes, these classifications do not indicate that intangible thoughts, ideas, and messages contained in computer video games, movies, or internet materials should be treated as products for purposes of strict liability.

Plaintiffs also cite a products liability case, *C.G. Bryant v. Tri-County Electric Membership Corporation,* 844 F.Supp. 347 (W.D.Ky. 1994). In *Bryant,* the court held that electricity was a product for purposes of strict liability because it was "created, harnessed, measured, transported, bought and sold, like products generally." 844 F.Supp. at 352. Again, contrary to Plaintiffs' analysis, this holding is distinguishable because in that case, the physical properties of electricity caused the harm. Here, Plaintiffs base their strict liability claims on the intangible characteristics of the products, rather than on their physical properties.

The Sixth Circuit has stated that "[w]here the state supreme court has not spoken, [the district court's] task is to discern, from all available sources, how that court would respond if confronted with the issue." *See Miles v. Kohli & Kaliher Assocs.,* 917 F.2d 235, 241 (6th Cir.1990). While there is no Kentucky case law on point, there is authority from the Sixth Circuit rejecting similar state law claims when reasoning "[t]he governing principles seem clear enough." *Watters,* 904 F.2d at 380. In *Watters,* the Sixth Circuit reviewed existing precedents and concluded, "[a]s far as we have been able to ascertain, . . . the doctrine of strict liability has never been extended to words or pictures. Other courts have looked in vain for [sic] decision so expanding the scope of the strict liability doctrine." *Id.* at 381. Inherent in this statement is the rationale that intangible thoughts, ideas, and messages contained within games, movies, and website materials are not products for purposes of strict products liability.

Counsel for the Plaintiffs fail to appreciate the critical distinction between intangible properties, such as those which caused harm to Plaintiffs, and tangible properties for which strict liability can be imposed. The Ninth Circuit explained this distinction in *Winter v. G.P. Putnam's Sons* by stating:

> A book containing Shakespeare's sonnets consists of two parts, the material and the print therein, and the ideas and expression thereof. The first may be a product, but the second is not. The latter, were Shakespeare alive, would be governed by copyright laws; the laws of libel to the extent consistent with the First Amendment; and the laws of misrepresentation, negligent misrepresentation, negligence, and mistake. These doctrines applicable to the second part are aimed at the delicate issues that arise with respect to intangibles such as ideas and expression. Products liability law is geared to the tangible world.

938 F.2d 1033, 1034 (9th Cir.1991). This reasoning is further supported by the Restatement Third of Torts. Although Kentucky courts have yet to adopt the Restatement Third of Torts, the Court predicts that the Kentucky Supreme Court, as it has always done in the past, will eventually adopt the newer edition of the Restatement of Torts. There, the word "product" is defined and a distinction is made between tangible and intangible properties. Moreover, the commentary for § 19(a) of the Restatement Third notes that courts "have, appropriately refused to impose strict product liability" in cases where the plaintiff's grievances were "with the information, not with the tangible medium." *Id.* at cmt.d.

Pursuant to the teachings of the Sixth Circuit's opinion in *Watters,* which is now further supported by the analysis found in the Restatement Third of Torts, the Court finds as a matter of law that intangible thoughts, ideas, and expressive content are not "products" within the realm of the strict liability doctrine.

2). *Causation*

Assuming *arguendo* that the doctrine of strict liability could be extended to include the thoughts, ideas, and messages contained in video games, movies, and website materials, Plaintiffs nevertheless would have to establish causation in order to state a claim based on strict liability theories. *See Morales v. American Honda Motor Co., Inc.,* 71 F.3d 531, 537 (6th Cir.1995). As was previously discussed, causation may be defeated by an intervening act that constitutes a superseding cause. The Court has already determined as a matter of law that Michael Carneal's actions constituted a superseding cause which broke the chain of causation. Therefore, in the alternative, Plaintiffs' strict liability claims would fail for lack of causation.

Plaintiffs' Cause of Action for RICO Violations

Plaintiffs allege in count four of their complaint that the Internet Defendants violated federal RICO statutes. Specifically, Plaintiffs state that:

> The Internet Defendants engaged in a pattern of racketeering activity by distributing certain obscene matter by means of the Internet through interstate commerce to Michael Carneal, a minor, in violation of state and federal obscenity and obscenity to minor statutes. This distribution of

> contraband material by the Internet Defendants violates 18 U.S.C. § 1961 *et seq*. Plaintiffs are "injured parties" under the federal RICO statute and as such are entitled to treble damages against the "Internet Defendants" [dkt.#1].

The Sixth Circuit has described the federal RICO Act as being "designed to give prosecutors an additional weapon against organized crime and to help protect legitimate businesses from infiltration by racketeers." *See Drake v. B.F.Goodrich Co.,* 782 F.2d 638, 644 (6th Cir.1986) (citations omitted). Congress included a civil remedies provision in the Act to authorize recovery for injury to a person's business or property. *See* 18 U.S.C. § 1964(c). By including a civil remedy, Congress intended to allow those who were "injured by the infiltration of organized crime into the legitimate business arena" to recover damages. Parties are attracted to the civil RICO statute because any amount of damages a jury awards is then tripled under the statute and recovery for both costs and attorneys' fees are allowed. *See* 18 U.S.C. § 1964(c). However, because the RICO civil remedies provision authorizes recovery only for certain types of claims and injuries, not every plaintiff asserting a RICO claim will have standing to bring the claim. As an initial matter, the Court must determine whether Plaintiffs have standing to assert their RICO cause of action.

Standing to Bring a Civil RICO Action

The RICO civil remedy provision provides that: "[a]ny person injured in his business or property by reason of a violation of section 1962 of this Chapter may sue therefore in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." *See* 18 U.S.C. § 1964(c). In order to have standing to assert a civil RICO claim, a plaintiff must properly plead three elements: 1) that a violation of § 1962 has occurred; 2) that he has suffered an injury to his "business or property;" and 3) that his injury was proximately caused by the violation of § 1962. *See* 18 U.S.C. § 1964(c); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985).

The First Element of A Civil RICO Claim – A Violation of § 1962

To demonstrate the first element of a civil RICO claim, that a violation of § 1962 has occurred, a plaintiff must allege that § 1962 was violated by a person associated with an enterprise, the actions of which affected commerce and were related to a pattern of racketeering activity. *See* 18 U.S.C. § 1962(a)-(d). Plaintiffs state in their complaint that the Internet Defendants "engaged in a pattern of racketeering activity by distributing certain obscene matter by means of the Internet through interstate commerce [,] . . . [that] [t]his distribution of contraband of material by the Internet Defendants violates 18 U.S.C. § 1961 *et seq.* [and that] Plaintiffs are 'injured parties' under the federal RICO statute." [dkt.#1]. The statement that Defendants distributed obscene materials in violation of state and federal obscenity laws only serves as the predicate act of racketeering upon which to base a § 1962 violation. The predicate act itself is insufficient to establish that § 1962 was violated. Instead, a plaintiff is required to plead facts demonstrating a violation of § 1962. Here, Plaintiffs merely state that "18 U.S.C. § 1961 *et seq.*" was violated. Plaintiffs' use of the inclusive language *"et seq.,"* is insufficient to satisfy the requirement that a plaintiff must allege a violation of § 1962 for several reasons.

First, as Plaintiffs' complaint omits a specific reference to § 1962, it fails to inform Defendants as to which subsection of § 1962 they are charged with violating. Section 1962 prohibits various types of activity and provides different theories upon which to base a claim. For example: § 1962(a) prohibits a person from investing illegally gotten proceeds in an enterprise; § 1962(b) prohibits a person from using racketeering activity to acquire control or interest in an enterprise; § 1962(c) prohibits a person from conducting an enterprise through the use of a pattern of racketeering activity; and § 1962(d) prohibits any person from conspiring with another to violate subsections (a), (b), or (c). As such, it is essential that a plaintiff specify upon which subsection of § 1962 his cause of action is predicated.

Second, Plaintiffs' failure to make a specific reference to § 1962 makes it difficult to discern for the purposes of the motion to dismiss whether they have stated a claim upon which relief can be granted. The elements of each subsection are different so it is important that the complaint set forth each essential element in order to properly state a claim. With the spirit of accepting liberal pleadings, the Court will attempt to glean from the pleadings under which subsection of § 1962 Plaintiffs bring their claim. Plaintiffs have not alleged that Defendants invested illegal proceeds, attempted to acquire control of an enterprise, or engaged in any type of conspiracy, therefore the only applicable subsection found in § 1962 would be subsection (c) which prohibits a person from conducting an enterprise through the use of racketeering activity. To state a cause of action pursuant to § 1962(c), a plaintiff must allege: 1) conduct; 2) of an enterprise; 3) through a pattern; 4) of racketeering activity. *See* 18 U.S.C. § 1962(c); *Sedima,* 473 U.S. at 496.

An enterprise is defined as "any individual, partnership, corporation, association or other legal entity, and any union or group of individuals associated in fact although not a legal entity." *See* 18 U.S.C. § 1961(4). The Supreme Court has stated that an enterprise is an entity, or a group of persons associated for a common purpose of engaging in a course of conduct. *See United States v. Turkette,* 452 U.S. 576, 580 (1981). The "enterprise" is not to be confused with the "pattern of racketeering activity." *See id.* Rather, it is an entity apart and distinct from the pattern of activity in which it engages. *See id.* Put simply, the enterprise is the "vehicle" through which a person conducts the racketeering activity. The existence of an enterprise is a separate element which must be alleged in order to show that a violation of § 1962 has occurred and that the first element of a civil RICO claim has been established. *See id.* at 583. Plaintiffs' complaint fails altogether to even mention the word "enterprise," let alone allege that Defendants belonged to or associated with an enterprise.

Again, with the spirit of accepting liberal pleadings the Court will attempt to glean from the pleadings the existence of any allegations which could be interpreted as constituting an enterprise and thereby "saving" Plaintiffs' claims. By definition, the companies named as the Internet Defendants would qualify as an enterprise since these companies could be used as a vehicle to conduct racketeering activity such as distributing obscene materials to minors. The fundamental flaw with this interpretation of the pleadings is that if the Court accepts that Plaintiffs intended for the named companies to be the enterprise, then the named companies cannot also be the named RICO defendants. It is well-established among the majority of appellate circuits that a corporation cannot serve dual roles as both the RICO defendant and the enterprise in a plaintiff's complaint. *See e.g., Libertad v. Welch,* 53 F.3d 428, 441 (1st Cir.1995) (stating that the "RICO enterprise cannot be named as the RICO defendant"); *Bennett v. U.S. Trust Co. of New York,* 770 F.2d 308 (2d Cir.1985) (holding that under section 1962(c), "a corporate entity may not be simultaneously the 'enterprise' and the 'person' who conducts . . . the racketeering activity"), *cert. denied,* 474 U.S. 1058 (1986); *B.F. Hirsch v. Enright Refining Co.,* 751 F.2d 628, 634 (3d Cir.1984) (stating, "a violation of section 1962(c) by a corporate entity requires an association with an enterprise that is not the same corporation"); *Haroco, Inc. v. American National Bank & Trust Co.,* 747 F.2d 384, 400 (7th Cir.1984) (stating, "section 1962(c) requires separate entities as the liable person and the enterprise"), *aff'd on other grounds,* 473 U.S. 479 (1985) (per curiam); *Rae v. Union Bank,* 725 F.2d 478, 481 (9th Cir.1984) (stating "if Union Bank is the enterprise, it cannot also be the RICO defendant"); *United States v. Computer Sciences Corp.,* 689 F.2d 1181, 1190 (4th Cir.1982) ("'enterprise' was meant to refer to a being different from . . . the person whose behavior the act was designed to prohibit"), *cert. denied,* 459 U.S. 1105 (1983); *Bennett v. Berg,* 685 F.2d 1053, 1061 (8th Cir.1982) ("defendant may not be both enterprise and person associated with enterprise").

Plaintiffs' failure to allege the existence of an enterprise alone is fatal to establishing the first element of their RICO claim, that a violation of section 1962(c) has occurred. *See e.g., Advocacy Organization for Patients &*

Providers v. Auto Club Ins. Assoc., 176 F.3d 315, 330 (6th Cir.1999) (affirming dismissal of RICO claim for, among other reasons, failure to sufficiently allege enterprise), *cert. denied,* ___ U.S.___, 120 S.Ct. 172 (1999). Assuming that Plaintiffs had sufficiently pleaded facts demonstrating the existence of an enterprise, Plaintiffs would then be required to demonstrate that Defendants used the enterprise to conduct their "pattern of racketeering activity."

In the complaint, Plaintiffs simply state that the Internet Defendants engaged in conduct constituting "a pattern of racketeering activity." This statement is insufficient as a plaintiff is required to allege facts which would establish that the defendant's "pattern of racketeering activity" was related to the enterprise. *See United States v. Qaoud,* 777 F.2d 1105, 1115 (6th Cir.1985) (stating that "[t]o establish that an enterprise's affairs have been conducted "through" a pattern of racketeering activity, there must be a nexus between the enterprise and the racketeering activity") (citations omitted). Again, Plaintiffs' complaint fails to allege the existence of an enterprise let alone plead facts establishing that Defendants used an enterprise to conduct a pattern of racketeering activity. Plaintiffs' RICO claim must be dismissed for failure to state a claim upon which relief can be granted.

As the Court has determined that Plaintiffs' RICO cause of action must be dismissed due to Plaintiffs' failure to allege the first essential element of the claim, normally there would be no need to address the remaining elements of the claim. However, as Plaintiffs' omissions could be cured by amending their complaint, the Court will proceed to analyze the remaining elements of their RICO claim in order to demonstrate why the claim would fail regardless of the technical pleading omissions.

The Second Element of a Civil RICO Claim – Injury to Business or Property

Assuming *arguendo* that Plaintiffs had properly alleged that § 1962 was violated by a person associated with an enterprise, Plaintiffs would then be required to demonstrate the second element of their claim: that they suffered an injury to "business or property" as a result of the RICO violation. Personal injuries and mental suffering do not confer a person with standing to bring a RICO claim because those types of damages are not injuries to "business or property." *See Fleischhauer v. Feltner,* 879 F.2d 1290, 1300 (6th Cir.1989), *cert. denied,* 493 U.S. 1074 (1990).

In an attempt to satisfy the requirement that they be injured in their business or property, Plaintiffs argue that their deceased daughters' loss of earning capacity constitutes an injury to property. The Sixth Circuit has stated that " 'injury to property' for RICO purposes is generally determined by state law." *Isaak v. Trumbull Savings & Loan Co.,* 169 F.3d 390, 397 (6th Cir.1999). Plaintiffs argue that under Kentucky law, earning capacity constitutes an interest in property. As support for this proposition, Plaintiffs cite *Inman v. Inman,* 578 S.W.2d 266 (Ky.Ct.App. 1979), as "recogniz[ing] that individuals hold a property interest in earning capacity." [dkt.#1]. There, the Kentucky Court of Appeals considered whether a professional license that enhanced a spouse's earning capacity should be placed in the category of "marital property" for the purposes of distributing marital assets following a divorce. *See id.* at 267. The *Inman* court stated that it had "strong reservations about placing a professional license in the category of marital property" but recognized that there were inequitable situations such as where one spouse puts another through graduate or professional school only then to be faced with a divorce and no maintenance payments. *See id.* In such situations, the *Inman* court reasoned that "treating a professional license as marital property is the only way in which a court can achieve an equitable result." *See id.* at 268. In arriving at this decision though, the *Inman* court explicitly stated that it "wish[ed] to place very strict limitations on apportionment of property pursuant to such findings." *See id.* at 269. The case was then remanded for the circuit court to determine what interest the spouse had in her husband's license to practice dentistry. *See id.* at 270. The circuit court made its findings and the husband appealed the court's decision. When the case went up on appeal for a second time, the Court of Appeals reversed its prior determination. The Kentucky Supreme Court then granted review to decide the applicability of the "law-of-the-case doctrine" which mandates that an appellate court on a subsequent appeal be bound by its decision on the former appeal. When reviewing the underlying matter, the Kentucky Supreme Court analyzed case law from other states, all of which rejected the notion that a professional license is marital property, and concluded, "[t]his court cannot accept the proposition that an educational degree . . . is . . . marital property." *See Inman v. Inman,* 648 S.W.2d 847 (Ky. 1982). Contrary to Plaintiffs' analysis, not only is the Court of Appeals' opinion in *Inman* regarding marital property totally inapposite to the determination of whether a deceased child's loss of earning capacity constitutes a property interest, but the rationale contained therein has since been rejected both by the appellate court that wrote the opinion and by the Kentucky Supreme Court. *See Inman,* 648 S.W.2d at 848.

Plaintiffs attempt to persuade the Court that the line between "injury to property" and pecuniary losses resulting from personal injuries is blurred. However, Plaintiffs have offered no other cases to support their proposition that under Kentucky law, earning capacity constitutes an interest in property. Instead of providing any other Kentucky case law, Plaintiffs make a citation reference to a Colorado case, *In re Marriage of Graham,* 574 P.2d 75 (Colo. 1978), which was discussed in the *Inman* opinion. In doing so, Plaintiffs place emphasis on a quoted passage from the Colorado case as stating "[c]lassification of earning capacity as property is not . . . farfetched . . . . a court, in defining the statutory concept . . . is in distinguished company when it refuses to be hamstrung by narrow definitions of 'property.'" Again, contrary to Plaintiffs' analysis, an examination of the full text of this passage reveals two fundamental flaws with any reliance thereon: 1) Plaintiffs' quoted passage is found in the dissenting opinion of the case rather than in its main text; and 2) the case holding rejects the notion that a professional license that enhances earning capacity should be considered marital property. Thus, although Plaintiffs may attempt to persuade this Court "that it would be in distinguished company if it refused to be hamstrung by narrow definitions of 'property,'" there is no authority to support Plaintiffs' proposition that under Kentucky law, earning capacity is construed as an interest in "property." Under traditional concepts of "property," the RICO claim cannot proceed because Plaintiffs cannot demonstrate an "injury to property."

Despite the absence of Kentucky case law supporting their proposition, Plaintiffs argue that "RICO applies to injuries asserted in this action, namely the destruction of the children's property rights to their future earnings." The Seventh Circuit, when confronted with a claimant trying to bring a civil RICO claim for loss of earnings stemming from personal injuries noted, "[p]erhaps the economic aspects of such injuries could, as a theoretical matter, be viewed as injuries to 'business or property,' but engaging in such metaphysical speculation is a task best left to philosophers, not the federal judiciary." *See Doe v. Roe,* 958 F.2d 763, 768 (7th Cir.1992). Here, even if the Court undertook some philosophical approach and construed earning capacity as a property right, the Court nevertheless would be unable to adopt such an interpretation because it would contravene Congress' intent in enacting the RICO statute. *See e.g., Reconstruction Finance Corp. v. Beaver County,* 328 U.S. 204 (1946).

Federal courts, when interpreting Congressional intent in enacting the RICO civil remedies provision, have widely held that personal injuries and the losses resulting therefrom do not constitute "injury to property" so as to fall within the ambit of the RICO statute. For example, in *Grogan v. Platt,* a case on point, the Eleventh Circuit rejected claims for lost earnings and loss of support as a basis for civil RICO recovery. *See* 835 F.2d 844 (11th Cir.), *cert. denied,* 488 U.S. 981 (1988). There, the families of two murdered FBI agents sought recovery of their sons' loss of earnings and loss of support under the civil remedies provision of the RICO Act. *See id.* Instead of focusing on whether economic damages such as lost earnings constituted an injury to property under the RICO statute, the Eleventh Circuit reasoned that the proper inquiry was "whether Congress intended the damages that plaintiffs seek in this case to be recoverable under civil RICO." *Id.* at 846. In deciding the issue, the Eleventh Circuit "[relied] on the assumption that Congress intends the ordinary meanings of the words it employs," and stated, "[i]n our view, the ordinary meaning of the phrase 'injured in his business or property' excludes personal injuries, including the pecuniary losses therefrom." *Id.* at 847. The Eleventh Circuit reasoned that the families of the murdered FBI agents were seeking a recovery that Congress had not designed RICO to afford. The Eleventh Circuit held that the families could not recover lost earnings and loss of support damages under RICO because "those pecuniary losses . . . are most properly understood as part of a personal injury claim" and not as a claim for injury to business or property. *See id.* at 848.

In *Drake v. B.F. Goodrich Company,* the Sixth Circuit espoused similar reasoning. See 782 F.2d 638 (6th Cir.1986). In *Drake,* the survivors of deceased workers who were exposed to toxic substances argued they should be allowed to bring a RICO claim to recover the decedents' lost wages. *See id.* The district court refused to allow the survivors to file the claim so they appealed the district court's decision. On appeal, the Sixth Circuit rejected the argument that pecuniary injuries derived from personal injuries confers a party with standing to assert a RICO claim. In doing so, the Sixth Circuit specifically acknowledged that "[t]he phrase 'business or property' . . . retains restrictive significance" which prevents such claims. *See id.* at 643-44. Other circuits have also refused to allow a plaintiff to assert a RICO claim based on pecuniary losses which are derived from personal injuries. *See e.g., Bast v. Cohen, Dunn & Sinclair, P.C.,* 59 F.3d 492 (4th Cir.1995); *Doe v. Roe,* 958 F.2d 763, 770 (7th Cir.1992); *Oscar v. University Students Co-operative Ass'n,* 965 F.2d 783 (9th Cir.1992) (holding that "a showing of 'injury' requires proof of concrete financial loss, and not mere 'injury to valuable intangible property interest' . . . [and that] personal injuries are not compensable under RICO").

The common rationale underlying these opinions is that pecuniary losses associated with personal injuries are not recoverable under the civil RICO provision because Congress created the civil remedies provision solely to afford relief to those injured in the legitimate business arena. It is hard to imagine that when Congress enacted civil RICO it contemplated that a child's earning capacity would be regarded as property, the loss of which would be recoverable threefold. Losses such as those sustained by Plaintiffs are more properly associated with state tort claims rather than federal civil RICO claims. Plaintiffs are not seeking the kind of recovery the RICO civil remedies provision was designed to afford. The Second Circuit explained, "[t]he requirement that the injury be to the plaintiff's business or property means that the plaintiff must show a proprietary type of damage. For example, a person physically injured in a fire whose origin was arson is not given a right to recover for his personal injuries; damage to his business or his building is the type of injury for which § 1964(c) permits suit." *Bankers Trust Co. v. Rhoades,* 741 F.2d 511, 515 (2d Cir.1984) (dictum), *vacated on other grounds,* 473 U.S. 922 (1985). The pecuniary losses derived from the wrongful death of their children simply cannot transform Plaintiffs' injuries into an injury to business or property. Plaintiffs are unable to establish the required "injury to property" element of their RICO claim, and without this element, Plaintiffs have no standing on which to bring their claim.

Although the Court has determined that Plaintiffs' RICO claim must be dismissed for failure to properly plead the first element of the claim and has also determined that it would fail for a lack of standing as to the second element, the Court will, at the risk of beating the proverbial dead horse, proceed to explain why Plaintiffs' claim would also fail as to the third element.

The Third Element of A Civil RICO Claim – A Violation of Section 1962 Caused Plaintiffs' Injuries

Again, assuming *arguendo* that Plaintiffs had established the first two elements, that section 1962 was violated by a person associated with an enterprise and that they suffered an injury to their business or property, the Court would then turn to the third element, that Plaintiffs's injuries were caused by the violation of § 1962. To satisfy this element, a plaintiff must allege facts which would establish that his injuries were a direct result of the § 1962 violation. It is insufficient for a plaintiff to allege that he was injured by the defendant's commission of the predicate act, in this case distributing obscene materials to minors. The Sixth Circuit's analysis in *Advocacy Organization for Patients and Providers v. Auto Club Insurance Association* is illustrative of this point. *See* 176 F.3d 315 (6th Cir.), *cert. denied,* ___ U.S. ___, 120 S.Ct. 172 (1999). There, the Sixth Circuit affirmed the district court's dismissal of a plaintiff's civil RICO claim brought under § 1962(b) for failure to state a claim upon which relief could be granted. *See id.* at 330. In explaining why a dismissal was proper, the Sixth Circuit stated:

> [A]ccording to 18 U.S.C. § 1964(c), plaintiff can only seek a civil remedy under RICO if her business or property was injured by reason of the § 1962(b) violation. Contrary to plaintiff's assertion, one does not violate § 1962(b) by committing mail fraud or extortion. Instead, one must use

> racketeering activity to gain control or interest in an enterprise. In other words, plaintiff cannot simply allege that she was injured by the underlying acts of mail fraud and extortion. Rather, she must allege that she was injured by a violation of § 1962(b). In this case, in order to be injured by a violation of § 1962(b), plaintiff must show that her alleged injuries resulted from Auto Club having maintained an interest in itself as an enterprise.

Id. (quotations omitted). Applying this analysis to Plaintiffs' allegations reveals another fatal flaw in their complaint. Plaintiffs were required to plead facts sufficiently demonstrating that their injuries resulted from Defendants' use of an enterprise to conduct a pattern of racketeering. Plaintiffs' complaint lacks such allegations. *See Craighead v. E.F. Hutton & Co., Inc.*, 899 F.2d 485, 494 (6th Cir.1990) (explaining that a § 1962(a) claim must fail when a plaintiff fails to allege injuries stemming directly from the § 1962 violation).

Again, assuming that Plaintiffs had properly pleaded that their injuries were a direct result of the § 1962 violation, their claim would fail on the premise that they could not establish that the § 1962 violation proximately caused their injuries. The Supreme Court has established that a "plaintiff . . . *can only recover to the extent that he has been injured in his business or property by the conduct constituting the violation.*" *Sedima,* 473 U.S. at 496 (emphasis added). Moreover, the Supreme Court has explicitly stated that a plaintiff's right to sue under the civil RICO provision requires a showing that the defendant's violation of the Act was not only a "but for" cause of the injury but was the "proximate cause" as well. *See Holmes v. Securities Investor Protection Corp.,* 503 U.S. 258, 268-70 (1992);

Fleischhauer v. Feltner, 879 F.2d 1290, 1300 (6th Cir.1989). Thus, assuming as true for the purposes of the motion to dismiss that the Internet Defendants violated the RICO Act as alleged in the complaint, Plaintiffs were still required to show that Defendants' actions *proximately caused* their daughters' deaths and subsequent loss of earning capacity.

The Sixth Circuit has stated that "'[c]ivil RICO is a statutory tort, so causation principles that generally apply in tort cases apply in civil RICO cases.'" *Kaufman v. BDO Seidman,* 984 F.2d 182, 185 (6th Cir.1993) (*quoting Reynolds v. East Dyer Development Co.,* 882 F.2d 1249, 1253 (7th Cir.1989). At this juncture, the Court's analysis regarding the causation element becomes subsumed by the Court's previous analysis regarding the causation elements under both negligence and strict liability theories. In short, Michael Carneal's intervening acts served as a superseding cause which broke the required causal connection needed not only for Plaintiffs to establish negligence and strict liability but also to establish civil RICO liability. Because Plaintiffs cannot demonstrate the requisite causal connection between their "injuries" and the acts of racketeering Defendants are alleged to have committed, they have failed to establish the third element of their RICO claim. Plaintiffs' RICO claim must be dismissed.[4]

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[4] Moreover, even if Plaintiffs had properly alleged and established the requisite elements to assert their RICO claim, it would be subject to dismissal for independent and sufficient grounds such as: 1) the failure to state which internet websites Michael Carneal visited, what type of "materials" were distributed, and how the distribution of such

(Continued on following page)

First Amendment Issues

By now it is clear that this case raises various constitutional concerns. However, the Supreme Court has stated, "[w]here there is no need to decide a constitutional question, it is a venerable principle of this Court's adjudicatory processes not to do so for '[t]he Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it.'" *Ashwander v. TVA*, 297 U.S. 288 (1936). In *Watters v. TSR, Incorporated,* this Court decided similar claims on constitutional grounds and did not analyze the claims pursuant to Kentucky law. *See* 715 F.Supp. 819 (W.D.Ky. 1989), *aff'd on other grounds,* 904 F.2d 378 (6th Cir.1990). On appeal, the Sixth Circuit reiterated to this Court the principle that "constitutional questions should be decided only where necessary." *See Watters,* 904 F.2d at 380. Although history may repeat itself, this Court has learned its lesson well. Therefore, since Kentucky law adequately resolves the issues presented in this matter, the Court will not address the constitutional issues looming in the background. Nevertheless, had the Court confronted the constitutional issues, it would have relied on its previous analysis in *Watters* where it explained:

> The theories of liability sought to be imposed upon the manufacturer of a role-playing fantasy game would have a devastatingly broad chilling effect on expression of all forms. It cannot be justified by the benefit Plaintiff claims would result from the imposition. The libraries of the world

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"materials" violated federal and state decency laws; and 2) Defendants' various affirmative defenses such as statutory compliance.

> are a great reservoir of works of fiction and nonfiction which may stir their readers to commit heinous acts of violence or evil. However, ideas expressed in one work which may drive some people to violence or ruin, may inspire others to feats of excellence or greatness. As was stated by the second Mr. Justice Harlan, 'one man's vulgarity is another man's lyric.' Atrocities have been committed in the name of many of civilization's great religions, intellectuals, and artists, yet the first amendment does not hold those whose ideas inspired the crimes to answer for such acts. To do so would be to allow the freaks and misfits of society to declare what the rest of the country can and cannot read, watch and hear.

Id. at 822.

Conclusion

Under existing law, which this Court has no power to change, the Court has ruled that:

> **1) Plaintiffs' negligence claims must be dismissed because Defendants owed no legal duty of care since Michael Carneal's actions were unforseeable. Alternatively, Michael Carneal's intervening acts constituted a superseding cause which absolved Defendants of liability;**
>
> **2) Plaintiffs' strict products liability claims must be dismissed because thoughts, ideas, and expressions contained within Defendants' movie, games, and website**

materials do not constitute a "product" within the realm of the strict liability doctrine; and

3) Plaintiffs' RICO claims must be dismissed because Plaintiffs cannot establish essential elements needed to support a civil RICO Act recovery.

This was a tragic situation, but as the Sixth Circuit stated in *Watters,* "[t]ragedies such as this simply defy rational explanation, and courts should not pretend otherwise." 904 F.2d at 384.

An order dismissing this case in its entirety will be entered.

This the 6th day of April, 2000.

/s/ Edward H. Johnstone
Edward H. Johnstone,
Senior Judge
United States
District Court

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION**

Joe James and Judy James, Co-Administrators of the Estate of Jessica James AND Thomas Wayne Steger and Sabrina Collins Steger, Co-Administrators of the Estate of Kayce Steger AND Gwen Hadley, Administratrix of the Estate of Nicole Marie Hadley,

Plaintiffs

v. Civil Action Number: 5:99CV-96-J

Meow Media, Inc., d/b/a www.persiankitty.com, Network authentication Systems, Inc., d/b/a www.adultkey.com, www.porntech.com Midway Home Entertainment, Apogee Software, Ltd., ID Software, Inc. Acclaim Entertainment, Inc. GT Interactive Software Corp., Interplay Productions, Inc., Nintendo of America, Sega of America, Inc., Virgin Interactive Media, Activision, Inc., Capcom Entertainment, Inc., Sony Computer Entertainment d/b/a Sony Interactive Studios America, Lasersoft, Inc., Williams Entertainment, Inc., Timer Warner, Inc., Polygram Film Entertainment Distribution, Inc., Island Pictures, Palm Pictures and New Line Cinema

Defendants

MEMORANDUM OPINION AND ORDER

This matter is before the Court on Plaintiffs' Motion to Alter, Amend or Vacate Judgment filed pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. Responses and a Replay have been filed. For the reasons set forth herein, Plaintiffs' Motion is denied.

The Sixth Circuit has held that "[m]otions to alter or amend judgment may be granted if there is a clear error law, newly discovered evidence, an intervening change in controlling law, or to prevent manifest injustice." *Gencorp, Inc. v. American Int'l Underwriters*, 178 F.3d 804, 833-834 (6th Cir. 1999) (internal citations omitted). Plaintiffs do not argue that they have newly discovered evidence, that there has been a change in controlling law or that a manifest injustice has occurred. Rather, Plaintiffs argue that the Court committed numerous errors, some of which were: 1) that the Court erroneously concluded as a matter of law that Michael Carneal's actions were unforeseeable; 2) that the Court erroneously deprived them of discovery; 3) that the Court failed to accept as true that the Defendants had actual knowledge; 4) that the Court erroneously relied upon the Restatement Third of Torts. The Court has reviewed its previous holdings contained in the memorandum opinion and has not found any clear error of law in its reliance on Sixth Circuit and Kentucky state law.

As was stated by the Sixth Circuit, "[a] motion under Rule 59(e) is not an opportunity to re-argue a case." *Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 146 F.3d 367, 374 (6th Cir. 1998). Instead, "where [a plaintiff] is attempting to obtain a complete reversal of the court's judgment by offering essentially the same arguments presented on the original motion, the proper vehicle for relief is an appeal." *Keweenaw Bay Indian Community v. Michigan*, 152 F.R.D. 562, 563 (W.D. Mich. 1992), *aff'd*, 11 F.3d 1341 (6th Cir. 1993); *see also Helton v. ACS Group*, 964 F. Supp. 1175, 1182 (E.D. Tenn. 1997). Therefore,

IT IS ORDERED:

1). *Plaintiffs' Motion to Alter, Amend or Vacate Judgment [dkt.#87] is denied.*

2). *This is a final and appealable order and there is no just cause for delay.*

This the 16th day of June, 2000.

/s/ E Johnstone
Edward H Johnstone,
Senior Judge
United States
District Court